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No. _____

In The
Supreme Court of the United States

WILLIAM M. O'NEILL

Petitioner,

v.

JONATHAN COUGHLAN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioner, a judicial candidate for the Supreme Court of Ohio, received a letter from Respondent Disciplinary Counsel, fifteen weeks before the general election, advising that Respondent had received a letter from a political adversary of the Petitioner, complaining that Petitioner's campaign materials violated multiple canons of Ohio's Code of Judicial Conduct. Petitioner filed suit in federal court–challenging the constitutionality of the canons under *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002). The district court held that the three canons were unconstitutional under the First Amendment and enjoined their enforcement. The Sixth Circuit vacated the judgment, holding that the district court should have abstained under *Younger v. Harris*, 401 U.S. 37 (1971). The questions presented are:

1. Is the mere initiation of an investigation by disciplinary counsel of a letter, complaining that a judicial candidate's campaign materials violate canons of the judicial code, an ongoing state proceeding requiring abstention under *Younger*, as the

Sixth Circuit determined here, in a ruling that conflicts with decisions of the Fourth and Fifth Circuit Courts of Appeals, holding that investigations (as opposed to formal charges) by administrative agencies of alleged violations of law do not constitute ongoing state proceedings under *Younger*, also followed by the Eighth Circuit?

2. Does a State Defendant waive *Younger* abstention when he pursues a litigation strategy at odds with that doctrine (by claiming that the controversy is not ripe, because no proceeding is pending and his actions are too incipient to even constitute a threat of prosecution, and by seeking dismissal of the complaint on the merits on the ground that the challenged canons are constitutional) and when he does not raise the issue of abstention until after the district court has granted a preliminary injunction in an opinion finding, on the merits, that the challenged canons are unconstitutional, but has

made no express statement on the record urging the district court to exercise its jurisdiction as in *Sosna v. Iowa*, 419 U.S. 393, 396-97, n.3 (1975); *Ohio Bureau of Employment Services v. Hordory*, 431 U.S. 471, 479-80(1977); *Brown v. Hotel Employees*, 468 U.S. 491, 500, n. 9 (1984)?

3. Does this case present extraordinary circumstances, warranting a federal court to decline to abstain under *Younger*, given that, under the state disciplinary system, there would be no opportunity to raise constitutional issues in state court until after the election?

LIST OF THE PARTIES

The parties to the proceedings in the lower court were the Honorable William M. O'Neill, as appellee and Jonathan Coughlan, in his official capacity as Disciplinary Counsel to the Supreme Court of Ohio, as appellant.

There are no corporate parties to this action to require the inclusion of a corporate disclosure statement pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States.

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PETITION FOR A WRIT OF CERTIORARI

William M. O'Neill respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Sixth Circuit denying Petitioner's Petition for Rehearing with Suggestion for Rehearing en banc is set forth in the Appendix at App. 73-74. The Opinion of the Court of Appeals, reported at 511 F.3d 638 (6th Cir. 2008), is set forth at App. 1-21. The Final Judgment of the United States District Court for the Northern District of Ohio is set forth at App. 22-24 The Memorandum and Order of the District Court granting summary judgment to the Petitioner and denying summary judgment to the Respondent, is set forth at App. 25-35. The Memorandum and Order of the District Court denying the motion to vacate, dissolve or modify its preliminary injunction, reported at 436 F.Supp.2d 905 (N.D.Ohio 2006), is set forth at App. 36-44. The Memorandum Opinion and Order of the District Court granting the petitioner's Motion for a Preliminary Injunction is set forth at App. 46-72.

JURISDICTION

The Opinion of the United States Court of Appeals for the Sixth Circuit was entered on January 9, 2008. The Order of the Court of Appeals denying rehearing and rehearing *en banc* was entered on May 13, 2008. This petition is being filed within 90 days of the order denying rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The First Amendment to the United States Constitution is reprinted in the Appendix to this Petition at App. 75. Relevant provisions of the Ohio Code of Judicial Conduct are reprinted at App. 76-77.

STATEMENT OF THE CASE

In thirty-nine states, judges are either elected to the bench in the first instance, or subject to retention elections after being appointed.[1]

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[1]Judges are elected in: Alabama; Arizona; Arkansas; California; Florida; Georgia; Idaho; Illinois; Indiana; Kentucky; Louisiana; Maryland; Michigan; Minnesota; Mississippi; Missouri;

Each of those states maintains a code of judicial conduct, which regulates the manner in which candidates for the bench may campaign for judicial office.[2]

In Ohio, judicial campaigns are governed by Canon 7 of the Code of Judicial Conduct, which contains several provisions imposing limits on judicial campaign speech. Three sections of that Canon are at issue here.

Canon 7(B)(1) provides: "A judge or judicial candidate shall maintain the dignity appropriate to judicial office."

Montana; Nevada; New Mexico; New York; North Carolina; North Dakota; Ohio; Oklahoma; Oregon; Pennsylvania; South Dakota; Tennessee; Texas; Washington; West Virginia; and, Wisconsin. Appointed judges are subject to retention elections in: Alaska; Colorado; Iowa: Kansas; Nebraska; Utah; and, Wyoming. See, American Judicature Society, Methods of Judicial Selection, available online at http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm? State= (last visited August 7, 2008).

[2]American Judicature Society, *Judicial Campaigns and Elections, Campaign Conduct*, available online at http://www.judicialselection.us/judicial_selection/campaigns_and_elections/campaign_conduct.cfm?state= (last visited August 1, 2008).

Canon 7(B)(3)(b) provides: "After the day of the primary election, a judicial candidate shall not identify himself or herself in advertising as a member of or affiliated with a political party."

Canon 7(D)(2) provides:

> During the course of any campaign for nomination or election to judicial office, a judicial candidate, by means of campaign materials, including sample ballots, an advertisement on radio or television or in a newspaper or periodical, a public speech, press release, or otherwise, shall not knowingly or with reckless disregard do any of the following:
>
> * * *
>
> (2) Use the term "judge" when a judge is a candidate for another judicial office and does not indicate the court on which the judge currently serves . . . .

Ohio is not unusual in having such restrictions.

Analogous provisions require candidates for judicial office to conduct "dignified" campaigns in many states.[3]

The codes of judicial conduct in a number of states prohibit judicial candidates from identifying themselves as being affiliated with a given political party, or seeking the support of a political party during an election campaign.[4]

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[3]See, e.g.: Colo. Code of Jud. Conduct, Canon 7(B)(1)(A); Fla. Code of Jud. Conduct, Canon 7(A)(3)(a); Id. Code of Jud. Conduct, Canon 5(A)(4)(a); Ill. Code of Jud. Conduct, Rule 67, Canon 7(A)(3)(a); Kan. Code of Jud. Conduct, Canon 5(A)(3)(a); Ky. Code Jud. Conduct, Canon 5(B)(1)(a); Mich. Code of Jud. Cond., Canon 7(B)(1); Miss. Code of Jud. Conduct, Canon 5(A)(3)(a); Neb. Code of Jud. Conduct § 5-205, Canon 5(A)(3)(a); N.M. Code of Jud. Conduct, § 21-700(B)(1); 22 N.Y.C.R.R. § 100.5(A)(4)(a); N.D. Code of Jud. Conduct, Canon 5(A)(3)(a); Ok. Code of Jud. Conduct, Canon 5(A)(3)(a); Pa. Code of Jud. Conduct, Canon 7(B)(1)(a); S.D. Code of Jud. Conduct, Canon 5(A)(3)(a); Tenn. Code of Jud. Conduct, Canon 5(A)(3)(a); Utah Code of Jud. Conduct, Canon 5(D)(1); W.Va. Code of Jud. Conduct, Canon 5(A)(3)(a); Wis. Sup. Ct. R. 60.06(3)(a); Wyo. Code of Jud. Conduct, Canon 5(A)(3)(a).

[4]*See, e.g.*: Ark. Code of Judicial Conduct, Canon 5(A)(1)(d) and (f)(candidates may not seek or use party endorsements or identifying party affiliation); Fla. Code of Jud. Conduct, Canon 7(C)(3)(candidates should refrain from making their party affiliation known); Id. Code of Jud. Conduct, Canon 5(A)(1)(d)(may not endorse or seek the endorsement of a political organization); Ky. Code of Jud. Conduct, Canon 5(A)(2)(shall not identify self as a member of a political party in advertising or

Restrictions on the use of the term "judge," in a judicial campaign are, however, concededly rare.[5]

The restrictions imposed on judicial campaign speech in thirty-nine states implicate the First Amendment in light of the holding in *Republican Party of Minnesota v. White*, 536 U.S. 765, 788 (2002).

Those restrictions are administered by state bar disciplinary systems which are systemically unable to provide a prompt adjudication of the

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speeches); Nev. Code of Jud. Conduct, Canon 5(C)(1) and commentary (may identify party affiliation in response to a direct question but not in campaign materials); N.D. Code of Jud. Conduct, Canon 5(A)(1)(d)(may not seek or accept party endorsements); Ore. Code of Jud. Conduct, J.R. 4-102(C)(shall not knowingly identify himself as a party member); Wash. Code of Jud. Conduct, Canon 7(A)1)(e)(should not identify self as a party member) Wis. Sup. Ct. R. 60.06 (2)(b)(party membership prohibited).

[5] A significant number of states prohibit a candidate from knowingly misrepresenting his qualifications to the electorate, and Montana prohibits a judge who is a candidate for judicial office from using the prestige of that office to promote his candidacy. Mont. Canons of Jud. Ethics, Canon 35, No. 30. Only Ohio expressly prohibits the use of the word "judge" without providing additional, qualifying information.

First Amendment rights of judicial candidates in the only period that matters, during a contested election.

To force federal courts to abstain from adjudicating the rights of such candidates in deference to the ponderous machinery of the state disciplinary systems is to deprive those candidates of a forum in which to timely vindicate the rights which *White* recognized.

A. The Petitioner's Judicial Campaign

In 2004, the Petitioner was a judge on the Ohio Court of Appeals and a candidate for Associate Justice of the Ohio Supreme Court.

The question of judicial campaign finance reform was, and is, a hotly contested aspect of state supreme court races in Ohio. State Chief Justice Thomas Moyer has recognized that the system of campaign contributions in Ohio undermines public confidence in the judiciary.[6]

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[6] See the remarks delivered by Chef Justice Moyer to the California Commission for Impartial Courts, July 14, 2008, available online at www.courtinfo.ca.gov/jc/tflists /documents/moyer.pdf.

Other Ohio Supreme Court Justices have been more blunt, comparing the solicitation of contributions to the outright sale of justice.[7]

Against this backdrop, Judge O'Neill made the need for judicial campaign finance reform the centerpiece of his campaign, refusing to accept contributions over ten dollars, and stressing, in his speeches and literature, the theme that "money and judges don't mix." App. 2-3.

On his campaign website, Judge O'Neill identified himself as the candidate committed to reforming what he saw as a broken system, with the following claim: "The time has come to end the public's suspicion that political contributions influence court decisions. The election of Judge O'Neill is the best step toward sending the message: 'This Court is Not For Sale!'" App. 3.

After the primary, Judge O'Neill continued to identify himself as a Democrat in his campaign brochure, notwithstanding the prohibitions of Canon 7(B)(3)(b).

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[7] Adam Liptak and Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. TIMES, October 1, 2006, at A1.

In addition, his campaign committee identified itself as the "Judge William O'Neill for Supreme Court Committee" without further stating that its candidate was presently a member of the Ohio Court of Appeals. App. 48.

On July 15, 2004, James Trakas, then Chairman of the Cuyahoga County Republican Party, wrote to the Respondent in his capacity as Ohio Disciplinary Counsel, alleging that the campaign materials described above violated the Code of Judicial Conduct. App. 3, 48.

The Trakas letter alleged that Judge O'Neill had violated two specific Canons of Judicial Conduct – Canons 7(B)(3)(b) and 7(D)(2) – and had engaged in campaign speech disparaging of the Ohio judiciary in general, an allegation which on its face implied a violation of the broadly worded Canon 7(B)(1), which requires judges and judicial candidates to preserve the dignity of the state judiciary. App. 3, 48.

The July 15, 2004 letter was sent to the Respondent in mid-campaign, sixteen weeks prior to the November general election. App. 3.

On July 21, 2004, just fifteen weeks before the general election, the Respondent sent a letter to Judge O'Neill, apprising him of the Trakas letter, and informing him that he was expected to respond to those allegations on or before August 4, 2004. App. 4.

Significantly, that letter noted that the Respondent was required to request a response from Judge O'Neill, and that the request for a response did not necessarily mean that charges would be filed against him. App. 50.

The sanctions for violating the Code of Judicial Conduct range from a public reprimand to permanent disbarment.[8]

B. The Ohio Disciplinary Process

Because the mechanics of judicial discipline in Ohio bear heavily on the question of whether the state disciplinary system itself (a) affords judicial candidates an adequate forum in which to assert their First Amendment rights (b) during the pendency of an election, and (c) informs the question of whether, for purposes of abstention,

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[8] Ohio R. Gov. Bar V, §§ 6 (H) and (J).

under *Younger v. Harris*, 401 U.S. 37 (1971), an ongoing state proceeding was underway when Judge O'Neill filed his federal case, the procedural aspects of that system merit mention here.

When a grievance is received by the Respondent, he is required to investigate the matter, and may solicit a response from the subject of the grievance.[9]

The Respondent must generally complete his investigation within sixty days, and reach a decision regarding the disposition of a given matter within thirty days after his investigation is completed.[10]

This ninety day period – which governs only the initial investigation – is hardly set in stone.

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[9] Ohio R. Gov. Bar V, § (4)(C)(investigation is mandatory) and Section (4)(G)(an investigating agency may require the target of an investigation, and any other lawyer or judge to cooperate during the course of its investigation).The disciplinary machinery applied to judges, judicial candidates and lawyers is the same in Ohio for purposes of this case. App. 12.

[10] Ohio R. Gov. Bar V, § (4)(D).

The Secretary of the Board of Commissioners may, upon written request, permit the Respondent to complete his investigation within 150 days of the date on which a grievance is filed.[11] This would allow roughly six months for the investigation and report.

In complex cases, cases involving litigation, or for good cause, the Chair of the Board of Commissioners may extend the period for investigation beyond 150 days.[12]

If an investigation is not completed within 150 days, it may also be assigned to a local grievance committee, which must complete its own investigation within sixty days.[13]

In such a case, 240 days would elapse between the receipt of a grievance and the issuance of a report.

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[11] Ohio R. Gov. Bar V, § (4)(D)(1).

[12] Ohio R. Gov. Bar V, § (4)(D)(2).

[13] Id.

The Rules for the Government of the Bar do require that investigations be completed no more than one year after a grievance is received.[14] The one year limit is not jurisdictional, however, and will not bar the filing of a disciplinary complaint absent some proof of prejudice.[15]

If, at the end of his investigation, the Respondent decides that charges should be brought against the subject of a grievance letter, he must prepare a formal complaint for submission to the Board of Commissioners.[16]

He may not submit that complaint, however, until he has provided a copy to the subject of his investigation, and allowed the subject to respond to the allegations contained therein.[17]

Once the formal complaint of misconduct is filed, the Secretary of the Board of Commissioners is required to submit it, together with

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[14] Id.

[15] Ohio R. Gov. Bar V, § (4)(D)(3).

[16] Ohio R. Gov. Bar V, §§ (4)(I)(1), (2) and (7).

[17] Ohio R. Gov. Bar V, § (4)(I)(2).

results of his investigation, to a probable cause panel charged with determining whether probable cause exists to believe that an ethical violation has occurred.[18]

The panel is required to reach its determination based solely upon the formal complaint, and the investigatory materials, but the Rules do not specify when it must act.[19]

If the panel determines that there is probable cause to believe a violation has occurred, it must certify the formal complaint to the Board of Commissioners.[20] Within twenty days, the subject of the complaint is required to file his answer.[21]

Thereafter (the Rules do not specify when) the Secretary of the Board of Commissioners is required to appoint the hearing panel to hear the case "upon reasonable notice."[22]

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[18] Ohio R. Gov. Bar V, § 6 (D)(1).

[19] *Id.*

[20] *Id.*

[21] Ohio R. Gov. Bar V, § 6 (E).

[22] Ohio R. Gov. Bar V, §§ 6 (D)(3) and (G).

The panel may continue the hearing for good cause. The Rules do not specify how long the panel has to set a hearing, or to hear the case.[23]

The hearing panel may, after taking testimony, recommend dismissal if it unanimously finds "the evidence is insufficient to support a charge or count of misconduct," or may find that the judicial canons have been violated, and recommend sanctions, ranging from a public reprimand to permanent disbarment.[24]

The decision of the hearing panel is subject to review by the entire Board of Commissioners.[25]

That determination is filed with the Clerk of the Ohio Supreme Court, which then issues a show cause order as to why the decision and recommendation of the Board of Commissioners should not be adopted.[26]

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[23] Ohio R. Gov. Bar V, §§ 6 (D)(3)(appointment of hearing panel) and (G)(setting and co tinuing the hearing).

[24] Ohio R. Gov. Bar V, § 6 (H) and (J).

[25] Ohio R. Gov. Bar V, § 6 (K).

[26] Ohio R. Gov. Bar V, §§ 6 (L) and 8 (A).

Only at this stage, the subject of a grievance may submit briefs to the Ohio Supreme Court setting forth his objections to the finding of the hearing panel.[27]

C. The District Court Litigation

Rather than await the outcome of this ponderous process, which could take years to adjudicate his claims, the Petitioner – whose speech was called into question weeks before an election – sought relief in district court, the jurisdiction of which was invoked pursuant to 28 U.S.C. §§ 1331, 2201 and 2202, and pursuant to 42 U.S.C. § 1983.

Petitioner filed his Complaint, together with a Motion for a Temporary Restraining Order and Preliminary Injunction, on August 12, 2004, twelve weeks before the general election. App. 47-48. Four days later, the district court held a hearing on his Motion for a Temporary Restraining Order. While the Respondent appeared through counsel, he declined to address the merits of the First Amendment claims raised by the Petitioner. App. 46.

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[27] Ohio R. Gov. Bar V, § 8 (B).

At no time during that hearing, did the Respondent assert that he had commenced a state proceeding against the Petitioner, or that the court was required to abstain from this case under *Younger*. App. 28, 37-38. In fact, he took a position utterly inconsistent with that contention: he claimed that his own actions had not progressed far enough to give rise to a case-or-controversy sufficient to support Article III standing. App. 15-16, 26-27.

At the conclusion of that hearing, the district court issued a temporary restraining order barring the Respondent from enforcing the contested canons. App. 46.

Two weeks later, the Respondent submitted a brief opposing preliminary injunctive relief and unambiguously moving the district court to dismiss Petitioner's case on the constitutional merits. The Respondent expressly argued that all three of the canons fully satisfied the First Amendment. App. 27. That brief also again characterized his actions as so preliminary, tentative and rote as to fail to give rise to a justiciable case or controversy.

> In this case, Disciplinary Counsel merely initiated the duty to investigate. As stated in part in Paragraph 19 of the Complaint, "a formal disciplinary charge has yet to be filed against Plaintiff, **and thus, there is no pending proceeding against plaintiff** . . ." Thus, Disciplinary Counsel has not yet exercised its discretion to file a Complaint against Plaintiff, nor has it even completed the investigation. Rather, Plaintiff would have this Court transform a grievance letter sent by a third party to Disciplinary Counsel as a "threat of prosecution."[28]

His brief also sought to distinguish an unreported Sixth Circuit decision as involving an ongoing state disciplinary proceeding, in contrast to this case, which involved merely "an investigation."[29]

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[28] Defendant's Memorandum in Opposition to Plaintiff's Motion for Preliminary or Permanent Injunction / Defendant's Motion to Dismiss, Docket No. 11, August 31, 2004 (Case No. 1:040CV-1612)(N.D.Ohio)(emphasis added).

[29] In *Harper v. Office of Disciplinary Counsel*, No. 96-3186, 1997 WL 225899 (6th Cir., May 2, 1997), the Sixth Circuit said, in dicta, that Canon 7(B)(1) served an important interest, but held that abstention barred the court from considering the merits.

On September 14, 2004, the district court granted a preliminary injunction, barring the Respondent from enforcing the contested judicial canons. App. 70-72.

The court found that Canon 7(B)(3)(b), which prohibits a judicial candidate from identifying his or her party affiliation after the primary election, was unconstitutionally overbroad, both on its face and as applied to Judge O'Neill, under *White* and *Eu v. San Francisco Democratic Central Committee*, 489 U.S. 214 (1989). App. 52-61.

The district court reasoned that the state has no interest in deciding what information voters may be trusted to rely upon in deciding, for themselves, between competing candidates for office, and that any state interest asserted was belied by the fact that, under the contested canon, a candidate remained free, after the primary, to identify his party affiliation orally, and to advertise in any form that he enjoyed the support of a given political party. App. 55, 60.

The court also found Canon 7(D)(2) – which prohibits judicial candidates from using the word, "judge," without specifying the court on which they sit as incumbents – to be facially overbroad,

reasoning that the state has no compelling interest in prohibiting candidates from engaging in truthful speech regarding their status and qualifications. App. 61-62.

Finally, the district court held that Canon 7(B)(1), which prohibits undignified campaign speech, was not narrowly tailored to advance an important governmental interest, and was overbroad as applied to Judge O'Neill. It did so after concluding that the canon swept within its reach a substantial number of protected campaign messages, and thus was not narrowly tailored to advance a compelling state interest. App. 63-65.

The Respondent neither appealed from that injunction, nor sought reconsideration of that decision in the district court. App. 5.

Then, on October 6, 2004, the Respondent filed a strange, procedural orphan with the district court, which he captioned a "supplement" to his motion to dismiss. In it, for the first time, he alleged that there was a pending state disciplinary action against Judge O'Neill, which required the district court to abstain from hearing this case under the rule announced in *Younger*. App. 5, 39.

In March 2006, the Respondent moved the district court to dissolve the injunction on abstention grounds, asserting precisely the same abstention arguments that he had presented in his "supplement" many months earlier. App. 5, 39.

The district court denied that motion in June 2006, concluding that an ongoing state disciplinary proceeding commenced against Petitioner when Respondent received the Trakas letter, but holding that Respondent had waived *Younger* abstention by arguing the constitutional merits. App. 39-44.

In January 2007, the district court granted summary judgment for Judge O'Neill and denied summary judgment to the Respondent, on the merits. App. 34-35. In doing so, the court adopted the reasoning that had lead it to preliminarily enjoin the enforcement of the contested disciplinary canons some two years earlier. App. 30-32.

D. The Sixth Circuit Appeal

Respondent appealed, and on January 9, 2008, the United States Court of Appeals for the Sixth Circuit vacated the judgment of the district court,

holding that it should have abstained from reaching the merits under *Younger*. App. 13-14.

The Sixth Circuit panel majority determined that an ongoing state proceeding had commenced against Judge O'Neill when the Respondent received the Trakas letter. App. 11-12.

The panel majority rejected the claim that the Respondent had waived abstention through his litigation conduct and the positions he had taken in the district court. App. 7-11.

The majority noted that this Court has yet to address the question of what sort of litigation conduct, by a state actor, will suffice to waive abstention and consent to the jurisdiction of a district court. App. 7.

It nonetheless found that the ability of courts to raise abstention, sua sponte, or on appeal, implied that, absent an express manifestation of consent to federal jurisdiction, a state may invoke abstention late in a case, and that the Respondent had not waived abstention simply by contesting the First Amendment merits below. App. 11.

In her dissent, Circuit Judge Moore disagreed, noting that the Respondent had not only argued the merits in the district court, but had also taken legal positions inconsistent with the invocation of *Younger* abstention in doing so. App. 14-15.

Judge Moore noted that the rule adopted by the majority would preclude judicial candidates from seeking to vindicate their First Amendment rights in federal courts in most cases, since those who sought relief prior to being accused of misconduct would present claims vulnerable to the accusation that they were not ripe for review, while those who sought relief after being accused before state bar officials stood in jeopardy of being put out of court on the basis of abstention. App. 14.

She found that the slow moving state disciplinary process did not afford Judge O'Neill an adequate, or timely, forum within which to assert his First Amendment claims during the only period that mattered – prior to the November election. App. 18-19. And she opined that, notwithstanding an inapposite decision of the Ohio Supreme Court, the mere receipt of the Trakas letter did not commence a state proceeding for purposes of *Younger* abstention. App. 16-17.

REASONS FOR GRANTING THE WRIT

I. DISCIPLINARY COUNSEL'S NASCENT INVESTIGATION OF A LETTER SUBMITTED TO HIM BY THE POLITICAL ADVERSARY OF A JUDICIAL CANDIDATE, COMPLAINING OF THE JUDICIAL CANDIDATE'S POLITICAL EXPRESSION, DOES NOT CONSTITUTE AN ONGOING STATE PROCEEDING SATISFYING THE FIRST PRONG OF THE ABSTENTION DOCTRINE OF *YOUNGER v. HARRIS*, 401 U.S. 37 (1971) AND THE SIXTH CIRCUIT'S DETERMINATION THAT IT DID, CONFLICTS WITH DECISIONS BY THE FOURTH, FIFTH AND EIGHTH CIRCUIT COURTS OF APPEALS. *TELCO COMMUNICATIONS v. CARBAUGH*, 885 F.2D 1225 (4TH CIR. 1989); *LOUISIANA DEBATING AND LITERARY ASSOCIATION v. CITY OF NEW ORLEANS*, 42 F.3D 1483 (5TH CIR. 1995); *PLANNED PARENTHOOD OF GREATER IOWA, INC. v. ATCHISON*, 126 F.3D 1042 (8TH CIR. 1997).

The Sixth Circuit's decision at issue here conflicts with those of the Fourth, Fifth and Eighth Circuits about what activity by a State agency constitutes an ongoing state proceeding triggering the *Younger* doctrine.

The majority of the panel, over Judge Moore's dissent, determined that the submission of a letter complaining about Petitioner's campaign statements to Ohio Disciplinary Counsel constituted the beginning of a state judicial process, triggering *Younger* abstention.[30]

The state "proceedings" to which the Sixth Circuit held the district court was obliged to defer were in the most embryonic stages. Respondent himself noted that an investigation into the allegations contained in the Trakas letter had just begun.

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[30] In reaching this conclusion, the majority relied on a decision of the Ohio Supreme Court finding that statements made in a written grievance were entitled to the absolute immunity accorded statements made in judicial proceedings from an action for defamation. *Hecht v. Levin*, 66 Ohio St.3d 458, 613 N. E. 2d 585 (1993). *Hecht* in no way touched upon nor analyzed the role of a citizen's written grievance in the context of balancing state versus federal jurisdictional interests.

Under the Ohio disciplinary system, then, an actual enforcement proceeding concerning the allegations in the Trakas letter was as much as a year away when that letter was received by the Respondent. Such a prosecution would not occur until **after** the Petitioner had responded to the letter sent, as a matter of routine, by the Respondent; **and** the Respondent had completed his investigation; **and** the Respondent had issued his report; **and** a probable cause panel had been appointed, **and** convened, **and** made a recommendation to file charges with the Board of Commissioners, **and**; until those charges were, in fact, filed.

Since *Younger* itself was decided, the Court has recognized that the concerns of federalism and comity which animate the abstention doctrine generally "have little force in the absence of a pending state proceeding." *Lake Carriers' Assn. v. MacMullan*, 406 U.S. 498, 509 (1972). Thus:

> When no state . . . proceeding is pending at the time the federal complaint is filed, federal intervention does not result in duplicative legal proceedings or disruption of the state criminal justice system; nor can federal intervention, in that

> circumstance, be interpreted as reflecting negatively upon the state court's ability to enforce constitutional principles.

Steffel v. Thompson, 415 U.S. 452, 462 (1974).

The Sixth Circuit found that the disciplinary process in Ohio begins with the receipt of a grievance, in this case, the Trakas letter.

It did so upon the strength of *Hecht v. Levin*, 66 Ohio St.3d 458, 613 N.E.2d 585 (Ohio 1993), a case in which the Ohio Supreme Court held that the absolute privilege against defamation, that attends statements made in the course of judicial proceedings, protects statements made by a client in a grievance against his lawyer.

But the public policy rationale that undergirds extending immunity from defamation claims to grievants does not justify a finding that state bar disciplinary proceedings begin – for all purposes, or for purposes of *Younger* abstention – the minute Chairman Trakas posts a letter to Respondent. As Judge Moore noted in dissent,

> The court based its holding that statements made in the course of disciplinary

> proceedings enjoy immunity against defamation claims in large part on public-policy considerations. Accordingly, we should not extend the holding of *Hecht* to hold that the filing of a grievance initiates a pending judicial proceeding for the purposes of *Younger* abstention

As Judge Moore also noted, to do otherwise conflicts with decisions of the Fourth and Fifth Circuit Courts of Appeals that analyzed the role investigations by administrative agencies occupy in evaluating abstention under *Younger* and determined that they did not satisfy *Younger's* first prong. *Telco Communications, Inc. v. Carbaugh*, 885 F. 2d 1225 (4th Cir. 1989); *Louisiana Debating and Literary Association v. City of New Orleans*, 42 F. 3d 1483 (5th Cir. 1995).

It also conflicts with the Eighth Circuit's decision in *Planned Parenthood of Greater Iowa, Inc. v. Atchison*, 126 F.3d 1042 (8th Cir. 1997) finding that the State Defendant's letter advising the Plaintiff that it was subject to state administrative regulations requiring a "certificate of need," did not constitute commencement of state proceedings for purposes of *Younger*.

In *Telco Communications*, Virginia's Office of Consumer Affairs sent a letter notifying a fund raiser that it had violated Virginia's charitable solicitation laws and invited a response from the fund raiser. The fund raiser sought relief on First Amendment grounds in federal court.

The Fourth Circuit found that *Younger* abstention was not appropriate where no formal enforcement action had been undertaken. *Telco*, 885 F.2d at 1229. Specifically, the court held that the "period between the threat of enforcement and the onset of formal enforcement proceedings" is an appropriate time for a litigant to bring his First Amendment challenges in order to preserve the opportunity to adjudicate those rights in federal court. *Id. Accord*, *Certa v. Harris*, 2001 WL 1301404 (4th Cir. 2001).

The Fifth Circuit Court of Appeals reached the same conclusion. In *Louisiana Debating and Literary Association*, a citizen filed four complaints with the New Orleans Human Relations Commission alleging that the plaintiff clubs had discriminated against him. *Louisiana Debating and Literary Association*, 42 F.3d at 1487.

The Commission sent the plaintiffs letters and requested a response. *Id.* Plaintiff clubs brought suit in federal court seeking protection of their privacy and associational rights under the Constitution.

The Fifth Circuit, in evaluating the City's claim that the district court should have abstained from exercising jurisdiction, noted the need to balance the "interests and rights that bring into play 'our Federalism' on the one hand, and federal courts' protection of constitutional rights on the other; a balancing . . . that reflects the majesty and scope of our living Constitution." *Id.* at 1488.

The court determined that the district court had properly declined to abstain, finding that the complaint and Commission's notification letter "had not progressed even as far as that in *Telco*." *Id.*

Similarly in *Planned Parenthood*, the Eighth Circuit Court of Appeals rejected the State Defendant's argument that Younger abstention was warranted in the face of a letter advising Plaintiff that its proposed clinic construction was subject to state certificate of need proceedings.

Citing *Telco* and *Louisiana Debating and Literary Association*, the Eighth Circuit explained: "Here, the plaintiff was not yet subject to coercive proceedings, and the CON administrative proceedings had not yet begun in earnest before plaintiff filed in federal court." *Planned Parenthood*, 126 F.3d at 1047.

Important in assessing the propriety of abstention under *Younger* is the distinction between an investigation and formal administrative enforcement proceedings initiated to prosecute alleged state law violations. The Fourth Circuit in *Telco* "declined to hold that *Younger* abstention is required whenever a state bureaucracy has initiated contact with a putative federal plaintiff," noting that "where no formal enforcement action has been undertaken, any disruption of state process will be slight." *Telco*, 885 F.2d at 1229. Otherwise, the court explained, requiring abstention whenever enforcement is threatened "would leave a party's constitutional rights in limbo while an agency contemplates enforcement but does not undertake it." *Id.*

The finding of the Sixth Circuit panel majority, that the mere submission of a letter by a political opponent to disciplinary counsel satisfies the ongoing state proceeding requirement of *Younger* is erroneous, and in conflict with the decisions of the Fourth, Fifth and Eighth Circuit Courts of Appeals. Petitioner seeks resolution of this conflict by this Court.

II. THIS CASE PRESENTS THE UNRESOLVED BUT IMPORTANT QUESTION OF WHETHER A STATE DEFENDANT WAIVES ABSTENTION UNDER *YOUNGER v. HARRIS*, 401 U.S. 37 (1971), WHEN HE PURSUES A LITIGATION STRATEGY WHOLLY AT ODDS WITH *YOUNGER* ABSTENTION, DOES NOT RAISE ABSTENTION UNTIL AFTER THE DISTRICT COURT HAS ISSUED A PRELIMINARY INJUNCTION BASED ON THE UNCONSTITUTIONALITY OF THE CONTESTED CANONS, BUT HAS NOT MADE AN EXPRESS STATEMENT URGING THE DISTRICT COURT TO EXERCISE FEDERAL JURISDICTION AS IN *SOSNA v. IOWA*, 419 U.S. 393, 396-97, n.3 (1975); *OHIO BUREAU OF EMPLOYMENT SERVICES v. HORDORY*, 431 U.S. 471, 479-80 (1977), and; *BROWN v. HOTEL EMPLOYEES*, 468 U.S. 491, 500, N. 9 (1984).

A state actor can waive its right to assert abstention under *Younger v. Harris*, 401 U.S. 37 (1971). *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 626 (1986).

This Court has repeatedly acknowledged that a federal court can proceed to adjudicate a constitutional claim–notwithstanding the fact that the procedural posture of the case meets the conditions for abstention under *Younger* – when a State Defendant ***by express statement*** urges the federal court to exercise jurisdiction. *Sosna v. Iowa*, 419 U.S. 393, 396-97, n.3 (1975); *Ohio Bureau of Employment Services v. Hordory*, 431 U.S. 471, 479-80 (1977); *Brown v. Hotel & Restaurant Employees & Bartenders*, 468 U.S. 491, 500, n. 9 (1984).

The question lingers, however, whether a State Defendant can be found to have waived its claim to abstention under *Younger* by its ***conduct***.[31] *See, O'Neill v. Coughlan*, 511 F.3d 638, 641 (6th Cir. 2008). (acknowledging that "no controlling authority has decided this precise issue.") And if so, what litigation conduct suffices to effect such waiver.

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[31] See, e.g., *Lapides v. Board of Regents*, 35 U.S. 613 (2002) (removal of suit to federal court by State Defendant effected a waiver of sovereign immunity); *see also, College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999)(discussing "constructive waiver" of immunity).

Respondent's litigation strategy in this case serves as an apt example of conduct effecting a waiver of his right to assert *Younger* abstention. In response to Petitioner's complaint, the Respondent urged dismissal on the ground that Petitioner's claims were not ripe for review. He vigorously and repeatedly asserted that the letter he had received, complaining of Petitioner's campaign statements, initiated nothing more than an investigation, and that there, in fact, "was ***no pending proceeding*** against" the Petitioner.[32]

Additionally, Respondent moved to dismiss the action on the merits–arguing that each of the challenged judicial canons was constitutional as a matter of law.

When, however, the district court, in a careful and thorough opinion granting a Preliminary Injunction, explained why the three canons were unconstitutional under the First Amendment, the Respondent attempted to avoid the defeat handed to him by the that court's ruling, by invoking the *Younger* doctrine.

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[32]*See supra*, Note 28 and accompanying text (emphasis added in both instances).

Respondent's litigation strategy sets forth a road map for State Defendants facing a constitutional challenge under 42 U.S.C. §1983. A State Defendant can appear and defend and test his theories on the merits in federal court. If, however, he fails to prevail in the federal action, he need only retrieve the *Younger* doctrine from his pocket to avoid an unhappy result.

The decision finding Respondent's conduct did not waive *Younger* abstention, essentially allows State Defendants to stage a dress rehearsal on the merits in federal court.

Other courts of appeals have grappled with the issue of under what circumstances, *Younger* abstention is waived, with confounding results. State Defendants have been found to have waived Younger abstention when they have raised abstention in the district court, but did not on appeal, *Winston v. Children Youth Serv.*, 948 F. 2d 1380, 1385 (3rd Cir. 1991); *Shannon v. Telco Communications, Inc.*, 824 F.2d 150, 151-52 (1st Cir. 1987) or, conversely, when they have failed to raise abstention in the district court, but raised it in the first instance on appeal. *Kleenwell Biohazard Waste and General Ecology Consultants, Inc.*, 48 F.3d 391, 394 (9th Cir. 1995).

In contrast, appellate courts have raised abstention under *Younger* sua sponte to find that abstention was, in fact, warranted.[33] *Morrow v. Winslow*, 94 F.3d 1386, 1390,1398 (10th Cir. 1996); (despite parties stated willingness in the district court to proceed in the federal forum); *H.C. ex rel. Gordon v. Koppel*, 203 F.3d 610, 613 (9th Cir. 2003); *See also, Louisiana Debating and Literary Association*, 42 F. 3d 1483, 1490 (5th Cir. 1995) (*Younger* abstention raised in district court and "partially briefed" in appellate court would be considered by court of appeals.)

In still other instances, courts, reasoning that waiver can be shown "only by express statement" and not by failure to raise the issue, have found that *Younger* abstention was not waived in the absence of such a statement on the record. *Columbia Basin Apartment Association v. City of Pasco*, 268 F.3d 791, 800 (9th Cir. 2001); *Boardman v. Estelle*, 957 F.2d 1523, 1535 (9th Cir. 1992).

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[33] In *Bellotti v. Baird*, 428 U.S. 132, 143 n. 10, (1976), this Court noted that the absence of "full argument" in the court below of *Younger* abstention did not bar its consideration of the issue and that "it would appear that abstention may be raised by the court sua sponte."

In each instance, courts were left to divine whether a State Defendant–in the absence of an explicit statement stating precisely as much–had waived its right to assert abstention under *Younger*.

The unsettled state of the waiver issue permitted the State Defendant to advance its acrobatic argument here–allowing it to tergiversate from its claim that Plaintiff's challenge to the judicial canons was not ripe for review because of the inchoate nature of the state proceedings, and to assert that the federal court should abstain in deference to the "non-proceeding" at the state level–nearly one month ***after*** the district court had issued a lengthy opinion on the merits, finding the contested canons unconstitutional. Memorandum and Order, R.14, September 14, 2004, at 7-14.

The district court found, and the dissent agreed, that Defendant's advocacy of the position that proceedings in the Disciplinary Counsel's office were so preliminary and so tentative that Plaintiff's claims had not given rise to a justiciable case or controversy, and Defendant's vigorous litigation of Plaintiff's claims on the merits, in concert with his failure to even hint that

abstention was in order, until first raising *Younger* after the district court had issued a lengthy opinion explaining the canons' constitutional deficiencies, effected a waiver of any claim for abstention. *Id.* at 644-45.

The idiosyncracies and ambiguities of the decisional law governing waiver of abstention under *Younger*, beg for a clear resolution by this Court, as does the precedent set in this case that accommodates a litigation strategy by state defendants allowing them to hold the *Younger* abstention card in reserve, to be played only after a district court tells them how strong a hand their opponent has.

III. THERE EXISTS AN IMPORTANT QUESTION AS TO WHETHER THE RECEIPT, FROM A POLITICAL OPPONENT, OF A LETTER ALLEGING ETHICAL MISCONDUCT AGAINST A CANDIDATE FOR JUDICIAL OFFICE, IN THE MIDST OF HIS CAMPAIGN, BASED SOLELY ON THE CONTENT OF HIS CAMPAIGN SPEECH, AND WHICH CANNOT BE RESOLVED BY THE STATE DISCIPLINARY SYSTEM BEFORE THE ELECTION, PRESENTS SUCH AN EXTRAORDINARY CIRCUMSTANCE AS TO PERMIT A DISTRICT COURT TO EXERCISE ITS JURISDICTION, NOTWITHSTANDING THE CLAIM THAT AN ONGOING STATE DISCIPLINARY PROCEEDING, WHICH MERITS ABSTENTION, IS PENDING.

This Court has long held that a district court should abstain from exercising its jurisdiction, in deference to an ongoing state judicial proceeding, which implicates important state interest, when that proceeding affords the putative federal plaintiff an adequate opportunity to have his constitutional claims adjudicated in the state system. *Younger v. Harris*, 401 U.S. 37 (1971).

In *Middlesex County Ethics Comm. v. Garden State Bar Assoc.*, 457 U.S. 423 (1986), the Court held that state bar disciplinary proceedings were among the class of proceedings to which *Younger* applied.

Since *Younger*, however, the Court has noted that, in extraordinary circumstances, the district courts would be justified in exercising their jurisdiction, despite the existence of the prerequisites to abstention. *Middlesex County*, 457 U.S. at 435; *Younger*, 401 U.S. at 54-54.

The Court in *Younger* refused to speculate as to what such an extraordinary circumstance would involve, but left open the possibility that, in addition to bad faith on the part of the state, such a showing could be made.

> There may, of course, be extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence of the usual prerequisites of bad faith and harassment.

* * *

> Other unusual situations calling for federal intervention might also arise, but there is no point in our attempting now to specify what they might be.

Younger, 401 U.S. at 53-54.

Extraordinary circumstances exist, not in rare cases, but in cases where the need for equitable relief is urgent, so that "whatever else is required, such circumstances must be 'extraordinary' in the sense of creating an extraordinarily pressing need for immediate federal equitable relief, not merely in the sense of presenting a highly unusual factual situation." *Trainor v. Hernandez*, 431 U.S. 434, 443 (1977).

This is a case in which extraordinary circumstances would justify the exercise of federal jurisdiction even if the factors that would ordinarily support abstention under *Younger* had been present. And it is not unique in that regard.

In *White*, 536 U.S. at 788, this Court expressly recognized that the protections of the First Amendment extend to judicial campaign speech.

In response to *White*, the House of Delegates of the American Bar Association amended the Model Code of Judicial Conduct to reflect the right of judicial candidates to comment on matters of public concern during the course of a judicial campaign.[34]

The states have been slow to adopt those revisions, however, and as of August 1, 2008, only nine of the thirty-nine states in which judges stand for election had adopted the changes proposed by the ABA.[35]

The tension between state judicial canons that restrict the campaign speech of judicial candidates, and the rule articulated in *White*, which affords First Amendment protection to judicial campaign speech, is obvious.

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[34] Cynthia Grey, *Developments Following Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), American Judicature Society, available at www.ajs.org/ (Last updated August 1, 2008, and last vistited August 4, 2008).

[35] *Id.* Those states are Arizona, Florida, Louisiana, Maryland, Minnesota, Nevada, New Mexico, South Dakota and Wisconsin. In addition, Iowa and Oklahoma have adopted also modified restrictions on judicial campaign speech. That said, it bears mention that in several of these states, generic rules against "undignified" campaign conduct remain in effect.

The problem is that candidates who attempt to enforce their First Amendment rights in federal court prior to being the subject of an allegation of misconduct will face the claim that they lack standing to contest the rules which trouble them, as Judge O'Neill did in the early phases of this case, while those who wait until they have been the subject of such an allegation would – under the rule adopted by the Sixth Circuit in this case – see their federal claims blocked by abstention.

In her thoughtful dissent below, Circuit Judge Moore observed how this combination will frustrate a candidate's access to a federal forum precisely when it is needed most; to resolve a pressing First Amendment question in the face of an approaching election.

> If plaintiffs seek vindication of their constitutional rights in federal court too early, then their cases will be dismissed for lack of ripeness. If these individuals bring federal suits upon ripening of the claims, then their cases will also be dismissed, this time under the *Younger* abstention doctrine. The majority opinion thus effectively forecloses access to the federal courts for individuals who claim

> that Ohio's Rules for the Government of the Bar and of the Judiciary are unconstitutional.

App. 15. That insight has proved to be accurate.

Since *White*, a number of federal court challenges to state judicial conduct codes have been dismissed for lack of ripeness because the plaintiffs themselves had not been charged with misconduct, or identified a speaker who had.[36]

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[36]*See: Indiana Right to Life v. Shepard*, 507 F.3d 545, 549-50 (7th Cir. 2007)(advocacy group lacked standing to contest judicial canon prohibiting candidates from answering pre-election questionnaires absent a showing that specific candidates were chilled in their expression by the contested canon or disciplined for violating it); *Alaska Right to Life Political Action Committee v. Feldman*, 504 F.3d 840, 849-50 (9th Cir. 2007)(pre-enforcement challenge to judicial conduct code dismissed as unripe); *Pennsylvania Family Institute v. Black*, 489 F.3d 156 (3rd Cir. 2007)(advocacy group did not present ripe challenge to judicial canon when it could not identify candidates in danger of discipline for answering its questionnaire); *c.f.: Carey v. Wolnitzek*, No. 3:06-36-KKC, 2007 W.L. 2726121 (E.D.Ky., Sept. 17, 2007)(challenge to one judicial canon was ripe for review because it presented a question capable of repetition but permanently evading review, but other claims against judicial canons dismissed as unripe); *But see: Yost v. Stout*, No. 06-4122-JAR, 2007 W.L. 1652063 (D.Kan, June 6, 2007)(judicial candidate had standing to contest three canons of judicial conduct which he believed barred campaign speech in which he intended to engage, and claim was ripe for review).

And, since *White*, at least one other federal court challenge to a state judicial conduct code, in addition to this one, has also been dismissed on the basis of abstention, in deference to an ongoing state disciplinary proceeding.[37]

Judicial candidates, like Judge O'Neill, whose campaign speech is contested as violating the judicial canons of their state are systematically precluded from obtaining a federal court determination of their First Amendment rights. This forces them to rely on the state bar disciplinary machinery to obtain whatever determination they can.

The trouble with this is not that state agencies and supreme courts are inadequate to the task of adjudicating First Amendment questions.

The trouble is that they are institutionally inadequate to the task of doing so **quickly enough** to allow a candidate whose campaign speech is impugned by a political rival to know what he may, and what he may not say, prior to an election.

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[37] *See: Spargo v. State Commission on Judicial Conduct*, 351 F.3d 65, 85-86 (2d Cir. 2003), *cert denied*, 541 U.S. 1085 (2004).

The ponderous, temporally open-ended disciplinary system in place in Ohio is not an aberration. Many states have disciplinary systems that permit investigations into allegations of judicial misconduct to go on for extended, or even indefinite periods. [38]

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[38] *See e.g.* New York: 22 NY ADC §§ 7000.3, 7000.6 (Upon receipt of a complaint, and prior to the filing of a formal complaint, "an initial review and inquiry may be undertaken," which may then followed by an investigation. Neither the initial review nor investigation have any time limitations.); Illinois: Ill. Const., art. VI § 15(c) (same); Texas: Rules 3 - 10 of the Procedural Rules for the Removal or Retirement of Judges (same); California: Rules 107 - 130 of the Rules of the Commission on Judicial Performance (2007) (same); Georgia: Rule 4 of Rules of the Judicial Qualifications Commission ("Whenever the Commission reaches the conclusion that a complaint fails to state, or the facts developed upon an initial inquiry to the judge or an investigation fails to show, any reason for the institution of disciplinary proceedings, the Commission shall so advise the complainant."); Indiana: Ind. Admission and Discipline Rule 25, § 8 (Upon receipt of a complaint, and prior to the initiation of formal proceedings, the Commission may conduct an initial inquiry followed by an investigation of indeterminate length. A judicial officer subject to an investigation, however, may demand the Commission to either institute formal proceedings or enter a formal finding within sixty days.).

If state bar officials are allowed to invoke abstention to prevent a federal determination of a candidate's First Amendment rights, the chances of a candidate obtaining any determination of his rights during the period that most matters – before the election is over – are nil.

Such a result renders *White* toothless, and creates an extraordinary circumstance in which a right recognized by this Court exists without a concomitant federal remedy.

Finally, the incapacity of state disciplinary proceedings to render a prompt determination of the constitutional claims of judicial candidates raises yet another reason why *Younger* abstention should not apply in the first instance.

Circuit Judge Moore captured the dilemma faced by a candidate whose campaign speech is alleged to violate the Code of Judicial Conduct during his campaign.

> Although O'Neill might have ultimately brought his constitutional arguments before the Ohio Supreme Court, the administrative disciplinary process

> afforded him no explicit opportunity to do so prior to review by the court. As a result, the administrative process did not offer O'Neill an adequate state forum to raise constitutional issues before the election.

App. 18-19.

This Court has stated that, in order for *Younger* abstention to apply, a state proceeding must provide the putative federal plaintiff with an "adequate" opportunity to raise any constitutional claims he might have. *Middlesex County*, 457 U.S. at 432. Adequacy, in this regard, has a temporal component, the "'opportunity to raise and have timely decided by a competent state tribunal the federal issues involved.'" *Id.*, 457 U.S. at 437 (quoting *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973)).

In *Middlesex County*, the respondent claimed that New Jersey's state bar disciplinary system did not provide an adequate forum for the resolution of his constitutional defenses to allegations of attorney misconduct. *Id.* at 435-36.

In rejecting that contention, this Court noted that the respondent had not only succeeded in obtaining sua sponte review of those questions by the New Jersey Supreme Court through a writ of certiorari to that court, but that New Jersey law permitted the subjects of state disciplinary proceedings to seek interlocutory review of such questions in the state supreme court. *Id.*, at 436.

No such opportunity existed for Judge O'Neill, whose only opportunity to obtain a judicial determination of First Amendment rights, in relation to the Code of Judicial Conduct, would come at the end of the arduous, multi-step disciplinary process that culminates in a review, by the Ohio Supreme Court, of the final recommendation issued by the Board of Commissioners on Grievance and Discipline.

From a temporal perspective, such an opportunity is neither timely nor adequate. To a candidate whose campaign speech is the subject of an allegation of misconduct, facing an election in a few short weeks, such a delay might as well be forever.

CONCLUSION

For these reasons, Petitioner respectfully requests that the Court accept this case for review.

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Dated: August 11, 2008

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206
File Name: 08a0009p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM M. O'NEILL,
Plaintiff-Appellee,

v. No. 07-3206

JONATHAN E. COUGHLAN,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Ohio at Cleveland.
No. 04-01612—Ann Aldrich, District Judge.

Argued: December 4, 2007

Decided and Filed: January 9, 2008

Before: GUY, MOORE, and GILMAN, Circuit Judges.

COUNSEL

ARGUED: Stephen W. Funk, ROETZEL & ANDRESS, Akron, Ohio, for Appellant. J. Michael Murray, BERKMAN, GORDON, MURRAY & DEVAN, Cleveland, Ohio, for Appellee.

ON BRIEF: Stephen W. Funk, ROETZEL & ANDRESS, Akron, Ohio, for Appellant. J. Michael Murray, Raymond V. Vasvari, Jr., BERKMAN, GORDON,

MURRAY & DEVAN, Cleveland, Ohio, for Appellee. GUY, J., delivered the opinion of the court, in which GILMAN, J., joined. MOORE, J. (pp. 6-8), delivered a separate dissenting opinion.

OPINION

RALPH B. GUY, JR., Circuit Judge. Defendant Jonathan E. Coughlan, Disciplinary Counsel for the Supreme Court of Ohio, appeals from the district court's grant of summary judgment to plaintiff William O'Neill in this action seeking to enjoin enforcement of three canons of the Ohio Code of Judicial Conduct. O'Neill, a judge of the Ohio Court of Appeals at the time, was accused of violating these canons while campaigning for election to the Ohio Supreme Court in 2004. The district court concluded that enforcement of these canons would impermissibly restrict O'Neill's free speech rights as guaranteed by the First Amendment. We vacate the judgment entered in favor of O'Neill because the district court should have abstained from deciding the merits of the case under the authority of *Younger v. Harris*, 401 U.S. 37 (1971).

I.

William O'Neill was a candidate seeking election to the Ohio Supreme Court in 2004. His campaign theme was "Money and Judges Don't Mix." To that

end, he supported judicial campaign finance reform and refused any donation over $10. In addition to the "Money and Judges Don't Mix" slogan, O'Neill's campaign website included the following statement: "The time has come to end the public's suspicion that political contributions influence court decisions. The election of Judge O'Neill is the best step toward sending the message: 'This Court is Not For Sale!'"

In July of 2004, James Trakas, Chairman of the Cuyahoga County Republican Party, filed a grievance with the Office of the Disciplinary Counsel. The grievance alleged that O'Neill's campaign literature (1) failed to disclose the court for which he was a judge, in violation of Ohio Code of Judicial Conduct Canon 7(D)(2) (prohibiting a candidate from "[using] the term 'judge' when a judge is a candidate for another judicial office and does not indicate the court on which the judge currently serves"); (2) wrongfully identified his political party affiliation, in violation of Canon 7(B)(3)(b) ("After the day of the primary election, a judicial candidate shall not identify himself or herself in advertising as a member of or affiliated with a political party"); and (3) wrongfully attacked the credibility of the Ohio judiciary. As to this last allegation, the grievance alleged that O'Neill's campaign statements "viciously malign the fair, unbiased and impartial judiciary" without specifying any canon that O'Neill violated. O'Neill and the district court, however, inferred that O'Neill was accused of violating Canon 7(B)(1), which requires judges and judicial

candidates to "maintain the dignity appropriate to judicial office."

Following standard procedure, the Office of the Disciplinary Counsel sent O'Neill a letter advising him of Trakas's grievance. That letter stated, in part:

> Please be advised that the enclosed grievance has been filed against you by James Trakas. Pursuant to Gov. Bar R. V, as referenced in Gov. Jud. R. II, the Disciplinary Counsel is required to investigate any matter filed with him or that comes to his attention. Accordingly, this office must obtain a response to such grievances, regardless of the form or ultimate sufficiency thereof. In accordance with Gov. Bar R. V, this investigation will be confidential.
>
> Please provide your written response on or before August 4, 2004. A copy of your reply will be sent to the grievant unless you request in writing that it not be so furnished . . . .

Without responding to this letter, O'Neill commenced this action in federal court alleging that the canons were unconstitutional under the First and Fourteenth Amendments.

O'Neill filed motions seeking a temporary restraining order and preliminary injunction to prevent Coughlan from enforcing the canons

against him. Coughlan argued in response that the case was not ripe for review and that Coughlan was not the proper defendant. After a prompt hearing, the district court rejected the "ripeness" argument, issued a temporary restraining order, and requested additional briefing on the question of whether a preliminary injunction should be issued as well. Coughlan's response included both opposition to the preliminary injunction and a motion to dismiss the complaint. In his brief, Coughlan reiterated his arguments that O'Neill's suit was not ripe because there had been no disciplinary action, and that he was the wrong defendant. He also argued that the injunction should not issue because O'Neill's claims were not likely to succeed on the merits.

On September 14, 2004, the district court granted plaintiff's motion for a preliminary injunction and deferred ruling on defendant's motion to dismiss. Coughlan did not move for reconsideration or file an appeal; but, ten days later, filed a "motion to clarify" whether the injunction applied only to O'Neill or to any person in the State of Ohio. In a "supplemental motion to dismiss" filed October 6, 2004, Coughlan argued for the first time that the district court should abstain from exercising its jurisdiction under *Younger*. The district court apparently never ruled on defendant's motion to dismiss.

On March 10, 2006, more than a year later, Coughlan moved to dissolve the preliminary injunction on the grounds of *Younger* abstention. In

denying the motion, the district court found that although abstention would apply, Coughlan had waived Ohio's *Younger* abstention argument by choosing to address the merits of O'Neill's constitutional claim without raising the issue of abstention. *O'Neill v. Coughlan*, 436 F. Supp.2d 905, 908 (N.D. Ohio 2006). In deciding the crossmotions for summary judgment that followed, the district court again found defendant had waived the argument for *Younger* abstention, granted O'Neill's motion for summary judgment, converted the preliminary injunction to a permanent injunction, and entered judgment accordingly. *O'Neill v. Coughlan*, No. 04-CV-1612, 2007 WL218717 (N.D. Ohio Jan. 26, 2007). The judgment declared that Canons 7(B)(3)(b) and 7(D)(2) are facially unconstitutional, and that Canon 7(B)(1) is unconstitutional as applied to O'Neill. This appeal followed.[1]

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[1] The dissent contends that O'Neill was placed in a catch-22. If he sought vindication in federal court too early, his case would be dismissed for lack of ripeness, and if he brought suit when his claim was ripe, it would be dismissed under the *Younger* abstention doctrine. I see no difference between O'Neill and any other litigant. All litigants who bring suit before their claims are ripe face dismissal. Similarly, if the *Younger* doctrine is applicable to a case that is ripe, it too will be dismissed. It can be assumed that in most cases where the *Younger* doctrine is applied, it is not to the liking of the plaintiff. The doctrine, founded on principles of comity, is based upon concerns that rise above the wishes of individual litigants.

II.

Under *Younger* abstention, absent unusual circumstances not asserted here, a federal court must decline to interfere with pending state civil or criminal proceedings when important state interests are involved. *Younger*, 401 U.S. at 41; *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982); *Squire v. Coughlan*, 469 F.3d 551, 555 (6th Cir. 2006); *Sun Refining & Mktg. Co. v. Brennan*, 921 F.2d 635, 638-42 (6th Cir. 1990). *Younger* abstention is not a question of jurisdiction, but is rather based on "strong policies counseling against the exercise of such jurisdiction." *Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619, 626 (1986).

A. Waiver

Both parties acknowledge that a state can waive application of *Younger* abstention. *Sosna v. Iowa*, 419 U.S. 393, 396-97 n.3 (1975); *Ohio Bureau of Empl. Servs. v. Hodory*, 431 U.S. 471, 479-80 (1977). The dispute here is whether a state waives the right to assert *Younger* simply by addressing the merits of the case without having raised the issue of *Younger* abstention. While no controlling authority has decided this precise issue, the decisions in *Sosna* and *Hodory* provide guidance concerning the relevant parameters of such a waiver. Specifically, the Court in *Sosna* raised the issue of *Younger* abstention *sua sponte*, but agreed to decide the case after the

state urged the Court to reach the merits of the plaintiff's constitutional claim. 419 U.S. at 396-97 n.3.

Similarly, *Younger* abstention was raised *sua sponte* in *Hodory*, but the state asked that the Court disregard *Younger* and decide the constitutional issue on the merits. The Supreme Court agreed to disregard *Younger* abstention because the state wanted a decision on the merits, explaining that:

> *Younger* and these cited cases express equitable principles of comity and federalism. They are designed to allow the State an opportunity to "set its own house in order" when the federal issue is already before a state tribunal.
>
> It may not be argued, however, that a federal court is compelled to abstain in every such situation. If the State voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back into the State's own system. In the present case, Ohio either believes that the District Court was correct in its analysis of abstention or, faced with the prospect of lengthy administrative appeals followed by equally protracted state judicial proceedings, now has concluded to submit the constitutional issue to this Court for immediate resolution. In either event, under these circumstances *Younger* principles of

> equity and comity do not require this Court to refuse Ohio the immediate adjudication it seeks.

Hodory, 431 U.S. at 479-80. It is instructive that in both *Sosna* and *Hodory*, the Supreme Court raised *Younger* abstention *sua sponte* well after the merits of the dispute had been argued and decided, and no suggestion was made that *Younger* had been waived because it was not raised earlier in the proceedings. Moreover, in both cases, the Court *permitted* the state to waive *Younger* abstention upon the state's clear and explicit statement that it did not want the Court to apply *Younger*. This indicates that it is not necessary for the issue to have been raised either in the state's first responsive pleading or before the state addresses the merits.

This court discussed a waiver of *Younger* abstention in *Federal Express Corp. v. Tennessee Public Service Commission*, 925 F.2d 962, 965 (6th Cir. 1991), but did not decide the precise question at issue in this case. This court held that the state defendant had not waived the argument for *Younger* absention. *Id.* at 967. In doing so, we concluded that the state was not required to raise abstention in its pleadings, particularly since abstention may be raised by the court *sua sponte*. *Id.* at 966-67. The defendant had argued for abstention, but also moved for consolidation of the hearing on the motion for preliminary injunction with the trial on the merits. The defendant conceded that

abstention did not apply at the hearing, but later retracted that concession in a supplemental filing. The court explained that the defendant had "persistently argued for abstention," and that the motion to consolidate hearing was "a means of avoiding duplicative proceedings rather than a request for the court to reach the merits of the constitutional issue." *Id.* at 967.

According to O'Neill, *Federal Express* implies that any request that the federal court reach the merits of the lawsuit constitutes waiver of any argument for *Younger* absention. Such an interpretation stretches the holding in *Federal Express* too far. This court merely restated the principle explained in *Hodory* and in *Dayton Christian Schools* that a state may waive an argument for *Younger* absention by affirmatively urging the federal court to proceed to the merits of a constitutional claim despite the possible application of *Younger* abstention. There was no such explicit waiver of abstention in *Federal Express.*

In another case, this court found that an argument for *Younger* abstention had not been waived even though the issue had not been raised by any party in the district court. *Beeman v. Stafford*, No. 94-3634, 1995 WL 456367, at *4 (6th Cir. Aug. 1, 1995) (unpublished). This court affirmed the denial of the habeas petition, but concluded that the district court should have abstained from deciding the merits. The *Younger* issue was raised *sua sponte* on

appeal, and we held that the district court had no discretionary authority to grant injunctive relief because *Younger* abstention applied. We also explained that although *Younger* abstention can be waived by a state, in each of the Supreme Court cases the state expressly urged the court to adjudicate the constitutional claim on the merits. *Id.* at *4 n.2 (quoting *Dayton Christian Sch.*, 477 U.S. at 626). Relying on the Supreme Court's precedent, this court concluded that: "When faced with grounds for *Younger* abstention, a federal court will only tread [wh]ere it is unequivocally invited." *Id.* We agree.

Accordingly, we find that Coughlan's failure to assert *Younger* absention before arguing for dismissal of the claims on the merits did not constitute waiver of the right to seek dismissal of the complaint on the grounds of *Younger* abstention.

B. Merits of *Younger* Abstention

Younger abstention requires a federal court to abstain from granting injunctive or declaratory relief that would interfere with pending state judicial proceedings. *Younger*, 401 U.S. at 40-41. We look to three factors to determine whether a court should abstain from hearing a case under the *Younger* doctrine: "(1) there must be on-going state judicial proceedings; (2) those proceedings must implicate important state interests; and (3) there must be an adequate opportunity in the state proceedings to raise constitutional challenges." *Sun Refining*, 921

F.2d at 639. O'Neill contested only the first factor, arguing that there was no ongoing state judicial proceeding because the filing of the grievance was a predicate to, but did not start, a state judicial proceeding.[2]

We reject O'Neill's argument, as the district court did, because the Ohio Supreme Court has held that the filing of a grievance is the beginning of the judicial process. *Hecht v. Levin*, 613 N.E.2d 585, 588 (Ohio 1993). In *Hecht*, the court was asked to decide whether the filing of a grievance under Gov. Bar R. V[3] is part of a judicial proceeding in the context of a

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[2] O'Neill does not challenge the finding that the other two factors supporting *Younger* abstention were present. In *Squire*, an Ohio state court judge filed suit against Coughlan in federal district court, alleging that the disciplinary process deprived her of due process by not revealing all of her accusers' names. The district court dismissed the case *sua sponte* based on *Younger* abstention, and we affirmed. We decided that judicial disciplinary proceedings are state judicial proceedings, qualifying them for *Younger* abstention; that the state has an important interest in attorney and judicial disciplinary proceedings; and that the process affords the accused an adequate opportunity to raise constitutional challenges. *Squire*, 469 F.3d at 556-57.

[3] The disciplinary procedures for judges adopts the procedures used for attorney discipline. "Except as provided in Sections 2(B) and (4) of this rule, complaints and grievances involving alleged misconduct by Justices, judges, and candidates for judicial office . . . shall be

libel and slander lawsuit. If the filing of a grievance is part of a judicial proceeding, then the griever is immune from libel and slander charges. The court concluded that the filing of a grievance is part of a "judicial proceeding" because "such a filing initiates the purely judicial disciplinary procedure created by this court pursuant to Article IV of the Ohio Constitution." *Id.* The court recognized that a grievance is subject to investigation and independent review in order to "separate the wheat from the chaff" before the filing of a formal complaint by the appropriate state authorities. *Id.* at 589. Nevertheless, the court held that the filing and investigation of a grievance was part of a state "judicial proceeding."

Despite this clear statement that judicial proceedings begin with the filing of a grievance, O'Neill argues that *Hecht* is not controlling because it determined that the filing of a grievance begins the judicial process in the context of a lawsuit, not a disciplinary action. We are not persuaded that the different context requires us to disregard *Hecht*'s unambiguous holding. Accordingly, the district court should have refrained from exercising its jurisdiction in this case.

The injunction ordered by the district court is

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brought, conducted, and disposed of in accordance with the provisions of this rule and Gov. Bar. R. V." GOV. JUD. R. II.

DISSOLVED, and the judgment in favor of O'Neill is **VACATED**.

DISSENT

KAREN NELSON MOORE, Circuit Judge, dissenting. I dissent because I believe that Coughlan waived application of *Younger* abstention and that, even in the absence of this waiver, the facts of the case did not warrant abstention. Coughlan initially argued that O'Neill's claim was not ripe; only after the district court rejected that argument and ruled against Coughlan on the merits of the preliminary injunction did he raise the issue of *Younger* abstention. Although a party to a civil proceeding may raise inconsistent legal arguments, in the instant case Coughlan did not make a ripeness argument and, in the alternative, an argument for abstention. Instead, the sequential timing of Coughlan's motions placed O'Neill in a catch-22. Consider the situation facing future subjects of Ohio's disciplinary proceedings under the precedent set by this case. If plaintiffs seek vindication of their constitutional rights in federal court too early, then their cases will be dismissed for lack of ripeness. If these individuals bring federal suits upon ripening of the claims, then their cases will also be dismissed, this time under the *Younger* abstention doctrine. The majority opinion thus effectively forecloses access to the federal courts for individuals who claim that Ohio's Rules for the Government of the Bar and of the Judiciary are unconstitutional.

I disagree with the majority's interpretation of precedent to require a conclusion that Coughlan did not waive application of *Younger* abstention. The relevant Supreme Court decisions discussing waiver hold that a federal court may raise the issue of *Younger* abstention *sua sponte* and that an explicit expression of the state's desire to submit to federal jurisdiction counsels against abstention. *Brown v. Hotel & Rest. Employees & Bartenders Int'l Union Local 54*, 468 U.S. 491, 500 n.9 (1984) (observing that: "[t]he New Jersey Attorney General . . . does not, however, press the *Younger* abstention claim before this Court, and instead submits to the jurisdiction of this Court in order to obtain a more expeditious and final resolution of the merits of the constitutional issue"); *Ohio Bureau of Employment Servs. v. Hodory*, 431 U.S. 471, 480 (1977) (exploring the applicability of *Younger* abstention *sua sponte* and concluding that "[i]f the State voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back into the State's own system"); *Sosna v. Iowa*, 419 U.S. 393, 396 n.3 (1975) (explaining that the Court had asked the parties to brief the issue of *Younger* abstention and received confirmation that both parties wished a determination on the merits). I agree with O'Neill that these cases "stand merely for the proposition that an express waiver will suffice to dispense with abstention, but [do not] make[] such an express repudiation mandatory." Plaintiff-Appellee Br. at 26. In *Federal Express Corp. v. Tennessee Public Service Commission*, 925 F.2d 962 (6th Cir.), *cert. denied*, 502

U.S. 812 (1991), we found no waiver and applied *Younger* abstention when the state agency "ha[d] persistently argued for abstention," with the exception of one concession at oral argument later retracted in a brief. *Id.* at 967. In contrast, Coughlan had not consistently argued for abstention but rather had made arguments inconsistent with its application. I therefore would affirm the district court's holding that Coughlan had waived application of *Younger* abstention.

Even if Coughlan had not waived application of *Younger* abstention, I do not believe that an ongoing state judicial proceeding existed as required under the first prong of the test set forth in *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982). The Ohio Supreme Court decision in *Hecht v. Levin*, 613 N.E.2d 585 (Ohio 1993), should be limited to the facts of the case, which involved a libel and slander action brought by an attorney against an individual who had filed a complaint regarding the attorney with a local bar association. *Id.* at 586. The Ohio Supreme Court had posed the question in that case narrowly: "We must decide in this case whether filing a grievance with a local bar association is a 'judicial proceeding' within the meaning of *Surace* [an Ohio Supreme Court case holding that statements made in judicial proceedings have immunity against defamation claims]." *Id.* at 588. The court based its holding that statements made in the course of disciplinary proceedings enjoy immunity against defamation

claims in large part on public-policy considerations. *Id.* at 589. Accordingly, we should not extend the holding of *Hecht* to hold that the filing of a grievance initiates a pending judicial proceeding for the purposes of *Younger* abstention. Instead, the facts of the instant case closely resemble those in two Fourth and Fifth Circuit cases, which declined to apply *Younger* abstention. In *Telco Communications, Inc. v. Carbaugh*, 885 F.2d 1225, 1228 (4th Cir. 1989), the Fourth Circuit held that *Younger* abstention was not required "where state proceedings were in a preliminary stage and where the state had imposed a prior restraint upon protected speech." In *Louisiana Debating & Literary Ass'n v. City of New Orleans*, 42 F.3d 1483, 1490 (5th Cir. 1995), the Fifth Circuit followed the logic of *Telco*, when a city Human Relations Commission had issued letters to private clubs regarding complaints filed against them but no other administrative activity had ensued. No Sixth Circuit case is exactly on point regarding the question whether the Disciplinary Counsel's issuing of a letter notifying a judge or attorney of a grievance filed against him or her catalyzes a pending state proceeding for purposes of *Younger* abstention.[1]

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[1] The facts in *Squire v. Coughlan*, 469 F.3d 551 (6th Cir. 2006), can be distinguished. In that case, we found abstention appropriate when the Disciplinary Counsel had completed its investigation and a probable-cause hearing had been set. *Id.* at 554. In the instant case, Ohio disciplinary proceedings were not yet underway at the time O'Neill filed his federal suit. The Disciplinary Counsel had merely issued a mandatory notice letter to O'Neill upon receipt of a

In addition, I think that the circumstances of this case do not satisfy the third prong of the *Middlesex* test because the state administrative process did not present O'Neill with an adequate opportunity to argue the constitutional issues related to the complaint against him. As a general matter, a judge or attorney may ultimately raise a constitutional defense to disciplinary proceedings against him or her because the Ohio Supreme Court reviews any determination by the Board of Commissioners that disciplinary action is required. *See* Gov. Bar R. V, § 8; Gov. Jud. R. II, § 5(D); *Spargo v. New York State Comm'n on Judicial Conduct*, 351 F.3d 65, 72-73 (2d Cir. 2003), *cert. denied*, 541 U.S. 1085 (2004). Significantly, however, O'Neill filed his federal suit twelve weeks before the Ohio judicial elections. Although O'Neill might have ultimately brought his constitutional arguments before the Ohio Supreme Court, the administrative disciplinary process afforded him no explicit opportunity to do so prior to

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grievance. There still existed the possibility that the Disciplinary Counsel might not have found in the course of its investigation substantial evidence of a violation of the Canons of Judicial Ethics. Furthermore, the statement in *Squire* that "a disciplinary proceeding against a judge is ordinarily commenced by the filing of a grievance with the Ohio Disciplinary Counsel," 469 F.3d at 553, is dicta having the sole purpose to describe the start of the judicial grievance process. That a disciplinary proceeding commences with the filing of a grievance, as a descriptive matter, does not mean that a state proceeding is pending for purposes of *Younger* abstention.

review by the court.[2] As a result, the administrative process did not offer O'Neill an adequate state forum to raise constitutional issues before the election; in the meantime, the threat of disciplinary action under the Judicial Canons restricted O'Neill's political speech.

Finally, a decision by the district court to abstain under *Younger* would have been undesirable as a matter of judicial policy. In *Gerstein* v. *Pugh*, 420 U.S. 103 (1975), the U.S. Supreme Court found *Younger* abstention unwarranted in a federal suit brought by individuals claiming a due-process right to a judicial

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[2] In *Squire*, we found that although "there were no explicit instructions in either the Bar Rules or the Judiciary Rules for raising constitutional claims at the precomplaint stage of the process," Judge Squire had not met her burden of proving "that Coughlan would have refused to consider her constitutional challenge." 469 F.3d at 557. The circumstances of O'Neill's case, however, differ from that of *Squire* because O'Neill was a judicial candidate and not simply a judge. The doubt regarding whether the Disciplinary Counsel or, subsequently, the Board of Commissioners might consider O'Neill's constitutional objections made the state disciplinary proceedings an inadequate forum. This situation of uncertainty is a far cry from the right to adjudicate a constitutional issue in a court. Had Coughlan chosen not to consider constitutional issues, O'Neill would have had to wait until review by the Ohio Supreme Court to raise his constitutional defenses. Accordingly, O'Neill would have faced a chilling effect on his speech during a critical preelection period.

hearing on whether probable cause existed for pretrial detention. *Id.* at 108 n.9. The Court determined that the district court "injunction was not directed at the state prosecutions as such, but only at the legality of pretrial detention without a judicial hearing, an issue that could not be raised in defense of the criminal prosecution." *Id.* Likewise, the harm in the instant case is not merely the disciplinary action that would accompany a determination that O'Neill violated the Judicial Canons, but also the disciplinary procedures themselves that were conducted twelve weeks prior to the Ohio judicial elections. At a crucial moment in his candidacy, O'Neill suffered irreparable injury because of the chilling effect on his exercise of his First Amendment rights. Just as the plaintiffs in *Gerstein* raised constitutional issues distinct from their defense to their prosecution, so too does the disciplinary proceeding against O'Neill implicate constitutional issues distinct from the question of whether he violated the Judicial Canons. *See Habich v. City of Dearborn*, 331 F.3d 524, 531 (6th Cir. 2003) (finding abstention inappropriate under *Gerstein*); *Flynt v. Leis*, 574 F.2d 874 (6th Cir. 1978) (same), *rev'd on other grounds*, 439 U.S. 438 (1979).

In conclusion, I believe that the district court decision in this case offers a paradigmatic example of the appropriate exercise by a federal court of its equitable jurisdiction when declining to exercise federal court subject-matter jurisdiction would position the plaintiff "between the Scylla of intentionally flouting state law and the Charybdis of

forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a [disciplinary] proceeding." *Steffel v. Thompson*, 415 U.S. 452, 462 (1974).

I respectfully dissent.

The HONORABLE WILLIAM M. O'NEILL,	)	Case No. 1:04-CV-1612
Plaintiff,	)	Judge Ann Aldrich
v.	)	
JONATHAN E. COUGHLAN,	)	**JUDGMENT**
Defendant.	)	

The court has filed its Memorandum and Order granting O'Neill's motion for summary judgment [Docket No. 47] and denying Coughlan's motion [Docket No. 52]; and hereby:

(1) converts the preliminary injunction into a permanent injunction;

(2) declares that Canons 7(B)(3)(b) and 7(D)(2) are facially unconstitutional and that Canon 7(B)(1) is unconstitutional as applied to the plaintiff;

(3) permanently enjoins the defendant and his officers, agents, servants, employees, and attorneys, and anyone in concert or participation with them who receives actual notice of this order (by personal service or otherwise) from enforcing, threatening to enforce, or recom-

mending enforcement of Canons 7(B)(3)(b) and 7(D)(2) of the Ohio Code of Judicial Conduct against any judicial candidate, and from investigating, threatening to investigate, or recommending investigation of possible violations thereof;

(4) permanently enjoins the defendant and any of his officers, agents, servants, employees, and attorneys, and anyone in concert or participation with them who receive actual notice of this order (by personal service or otherwise) from enforcing, threatening to enforce, or recommending enforcement of Canon 7(B)(1) of the Ohio Code of Judicial Conduct against any judicial candidate based on nonobscene, nondefamatory speech, and from investigating, threatening to investigate, or recommending investigation of possible violations thereof based on nonobscene, nondefamatory speech;

(5) orders that this injunction shall not be construed to enjoin any person from enforcing, threatening to enforce, or recommending enforcement of Canon 7(B)(1) of the Ohio Code of Judicial Conduct, based on defamatory speech, obscene speech, or nonexpressive conduct, i.e. conduct that is not speech, or from investigating, threatening to investigate, or recommending investigation of possible violations thereof;

(6) orders that the plaintiff need not post bond to secure this permanent injunction; and

(7) enters final judgment in favor of the plaintiff.

IT IS ORDERED that this action is dismissed pursuant to Federal Rule of Civil Procedure 58. This judgment is final and appealable.

/s/ Ann Aldrich
ANN ALDRICH
UNITED STATES DISTRICT JUDGE

Dated: January 26, 2007

The HONORABLE WILLIAM A. O'NEILL,	)	Case No. 1:04-CV-1612
Plaintiff,	)	Judge Ann Aldrich
v.	)	
JONATHAN E. COUGHLAN,	)	**MEMORANDUM AND ORDER**
Defendant.	)	

Before the court are cross-motions for summary judgment by plaintiff William O'Neill ("O'Neill") [Docket No. 47] and defendant Jonathan Coughlan, Disciplinary Counsel for the Supreme Court of Ohio ("Coughlan") [Docket No. 52]. For the following reasons, the court grants O'Neill's motion, denies Coughlan's motion, converts the preliminary injunction to a permanent injunction, and enters final judgment in favor of O'Neill.

I. Background

O'Neill, an Ohio Court of Appeals Judge, was a candidate for a seat on the Ohio Supreme Court in the November 2004 election. O'Neill's campaign literature, advertising, and website identified him as a judge on the Court of Appeals for the Eleventh District and identified him as a Democrat. Those materials also advanced the theme "Money and Judges Don't Mix" in connection with his call for judicial campaign finance reform and

his policy of declining donations of over $10. In July 2004, O'Neill received a letter from Coughlan's office, indicating that a grievance had been filed against O'Neill regarding his campaign activities and ordering O'Neill to respond as required by Ohio's rules governing the judiciary and state bar. O'Neill instead filed a complaint in federal court in August 2004,seeking injunctive relief from the enforcement of three canons of the Ohio Code of Judicial Conduct ("the Code"), because those canons violated the federal constitutional free speech rights of state judicial candidates.[1]

In a brief filed on August 16, 2004 [Docket No. 7], and again at the show cause hearing held on that date, Coughlan initially argued that the court lacked jurisdiction because O'Neill's claims were unripe, and because

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[1]Canon 7(B)(1) requires judges and judicial candidates to "maintain the dignity appropriate to judicial office." O'Neill challenges the enforcement of this canon with regard to his campaign materials' arguable insinuation that Ohio Supreme Court seats are "for sale" to campaign donors.

Canon 7(B)(3)(b) provides that "[a]fter the day of the primary election, a judicial candidate shall not identify himself or herself in advertising as a member of or affiliated with a political party."

Canon 7(D)(2) states that judicial campaign materials and ads may not "[u]se the term 'judge' when a judge is a candidate for another judicial office and does not indicate the court on which the judge currently serves."

Coughlan was not the proper party in interest. After hearing oral argument at that hearing, the court rejected Coughlan's arguments, and issued a temporary restraining order ("TRO") running through August 26, 2004. On O'Neill's motion, the court extended the TRO through September 14, 2004 [Docket No. 9].

On August 31, 2004 and September 8, 2004, Coughlan filed briefs in opposition to O'Neill's motion for a preliminary injunction and seeking dismissal of the case [Docket Nos. 11, 13]. In his August 31 brief, while declining to address O'Neill's as-applied challenges to the canons, Coughlan chose to specifically "address the facial challenges to each Canon that Plaintiff raises below in order to demonstrate that Plaintiff will not succeed on the merits of his action" (Def.'s Mem. in Opp'n [Docket No. 11], at 8-9). Coughlan then proceeded to argue in that brief that this case is distinguishable from *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), and that each of the three challenged canons is constitutional. (*Id.*, at 9-15).

After considering Coughlan's additional briefs [Docket Nos. 11, 13] and O'Neill's additional briefs [Docket Nos. 10, 12], the court issued a preliminary injunction ("PI") [Docket No. 14] on September 14, 2004, relying principally on *Ashcroft v. ACLU*, 535 U.S. 564 (2002), and *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002). In issuing the PI, the court accepted Coughlan's explicit invitation to determine the constitutional merits of O'Neill's claims after Coughlan had refused to address those merits in opposing the TRO, and found that O'Neill's claims

had constitutional merit. The court determined that O'Neill was very likely to show that Canons 7(B)(3)(b) and 7(D)(2) violate the First Amendment, both facially and as applied to him. The court further determined that O'Neill was very likely to show that the enforcement of Canon 7(B)(1) was unconstitutional as applied to him.

On October 6, 2004, Coughlan filed a "supplement" to his earlier motion to dismiss [Docket No. 16], for the first time seeking dismissal of the case based on *Younger* abstention grounds. *Younger v. Harris*, 401 U.S. 37 (1971). Coughlan raised *Younger* abstention for the first time after declining to address the merits of O'Neill's claims in opposing the TRO, then explicitly addressing the merits of those claims in his brief in opposing the PI. In March 2006, Coughlan filed a motion to dissolve the PI [Docket No. 29] on *Younger* abstention grounds. The court denied that motion in June 2006 [Docket No. 37], finding that although *Younger* abstention would require dismissal of this matter for lack of subject matter jurisdiction, Coughlan's choice to argue the merits of the case in opposing the PI constituted waiver of *Younger* abstention. The parties then filed the instant cross-motions for summary judgment.

II. Discussion

Summary judgment is appropriate if "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the initial burden

of demonstrating the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25 (1986); *Hedrick v. W. Reserve Care Sys.*, 355 F.3d 444, 451 (6th Cir. 2004). If the movant succeeds, the burden then shifts to the nonmoving party to demonstrate the existence of a material dispute as provided in Rule 56(e):

> An adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Fed. R. Civ. P. 56(e); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). Parties opposing summary judgment must go beyond the pleadings and produce some type of evidentiary material in support of their position. *See Celotex*, 477 U.S. at 324.

In determining whether a genuine issue of material fact exists, this Court must view the evidence in a light most favorable to the nonmoving party. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Hamby v. Neel*, 368 F.3d 549, 556 (6th Cir. 2004); *Williams v. Int'l Paper Co.*, 227 F.3d 706, 710 (6th Cir. 2000). A fact is "material" only if its resolution will affect the outcome of the lawsuit. *Anderson*, 477 U.S. at 248. An issue is

"genuine" if the evidence is such that a reasonable juror "could find by a preponderance of the evidence that the [nonmoving party] is entitled to a verdict" or whether the evidence is "so one-sided that [the moving party] must prevail as a matter of law." *Id.* at 252. Rule 56(c) "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

The facts are basically undisputed in this matter, though the parties of course disagree over the application of the law to the facts. In its PI order [Docket No. 14], the court found it very likely that Canons 7(B)(3)(b) and 7(D)(2) were unconstitutional on their face, because they violate the First Amendment by restricting speech on the basis of content, and that Canon 7(B)(1) was unconstitutional as applied to O'Neill for the same reason. The court then found that the balance of harms and the public interest strongly favored granting an injunction, and enjoined Coughlan from enforcing the canons as detailed in that order. The court hereby declares that Canons 7(B)(3)(b) and 7(D)(2) are facially unconstitutional and that Canon 7(B)(1) is unconstitutional as applied to O'Neill, for the reasons more fully explained in the PI order. Coughlan has made no new arguments and has not pointed to any new case law that would cause the court to reconsider its earlier conclusions.

In determining whether to issue a permanent injunction, the court must consider (1) whether the movant is actually successful on the merits, (2) whether the movant would suffer continuing irreparable injury for which there is no adequate remedy at law if the court fails to issue the injunction, (3) whether the injunction would cause substantial harm to others, and (4) whether the public interest would be served by issuance of the injunction. *United States v. Szoka*, 260 F.3d 516, 523 (6th Cir. 2001) (citing *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1067 (6th Cir.1998); *Blue Cross & Blue Shield Mut. of Ohio v. Blue Cross & Blue Shield Ass'n*, 110 F.3d 318, 322 (6th Cir.1997)).

Because of O'Neill's success on the constitutional merits of his claim, the court also finds that failure to issue the permanent injunction would cause continuing irreparable harm. The denial of constitutional rights has been held by numerous federal courts, including the Supreme Court, to constitute irreparable harm. Specifically, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). It follows, as a matter of law, that O'Neill will suffer continuing irreparable harm if Coughlan is not enjoined from enforcing the challenged canons, and that O'Neill possesses no adequate remedy at law for this irreparable harm. The court also finds that Coughlan will not suffer any appreciable amount of harm if he is enjoined from enforcing the canons at issue. Therefore, the third factor considered regarding the issuance of a permanent injunction favors O'Neill.

It is also in the public interest to prevent the enforcement of unconstitutional laws and to vindicate constitutional rights. The court therefore finds that the public interest would be served by a permanent injunction.

Coughlan again raises *Younger* abstention and asks this court to dismiss O'Neill's complaint for lack of subject matter jurisdiction, but makes no new arguments and cites no new or controlling authority that causes the court to reconsider its June 2006 order denying dissolution of the PI because Coughlan has waived *Younger* abstention. The court therefore finds that *Younger* abstention does not apply, for the reasons more fully explained in that order. Finally, Coughlan argues that basic concerns of comity between state and federal courts require this court to decline jurisdiction, apart from *Younger*. *Grand Trunk W. R.R. Co. v. Consol. Rail Corp.*, 746 F.2d 323, 326 (6th Cir. 1984) (citation omitted). Under *Grand Trunk*, the court must consider five factors in deciding whether to decline jurisdiction:

> (1) whether the declaratory action would settle the controversy;
> (2) whether the declaratory action would serve a useful purpose in clarifying the legal relations in issue;
> (3) whether the declaratory remedy is being used merely for the purpose of "procedural fencing" or "to provide an arena for a race for res judicata;"
> (4) whether the use of a declaratory action would increase friction between our federal and state

courts and improperly encroach upon state jurisdiction; and
(5) whether there is an alternative remedy which is better or more effective.

Id. In this case, a declaratory judgment would settle the controversy, would serve a useful purpose in clarifying the constitutional rights in issue, would not be used for procedural fencing or in a race for res judicata, and is superior to any alternative remedy. Coughlan argues that a declaratory judgment by this court would increase friction between federal and state courts and improperly encroach upon state jurisdiction. However, this court's duty is to protect the constitutional rights of individuals who are properly before it. And as Coughlan has waived *Younger* abstention, sought the ruling of this court on the merits of O'Neill's claims and lost, it seems odd for Coughlan now to argue that a state forum would be a superior forum. In analyzing the five *Grand Truck* factors, the court finds that comity does not require dismissal of O'Neill's complaint.

Because the court has declared the canons at issue unconstitutional and found that a permanent injunction should issue in this case, and because the court finds that neither *Younger* abstention nor comity requires the court to decline to enter such a declaration and injunction, the court grants O'Neill's motion for summary judgment and denies Coughlan's motion for summary judgment.

III. Conclusion

For the foregoing reasons, the court grants O'Neill's motion for summary judgment [Docket No. 47] and denies Coughlan's motion [Docket No. 52], and:

(1) converts the preliminary injunction into a permanent injunction;

(2) declares that Canons 7(B)(3)(b) and 7(D)(2) are facially unconstitutional and that Canon 7(B)(1) is unconstitutional as applied to the plaintiff;

(3) permanently enjoins the defendant and his officers, agents, servants, employees, and attorneys, and anyone in concert or participation with them who receives actual notice of this order (by personal service or otherwise) from enforcing, threatening to enforce, or recommending enforcement of Canons 7(B)(3)(b) and 7(D)(2) of the Ohio Code of Judicial Conduct against any judicial candidate, and from investigating, threatening to investigate, or recommending investigation of possible violations thereof;

(4) permanently enjoins the defendant and any of his officers, agents, servants, employees, and attorneys, and anyone in concert or participation with them who receive actual notice of this order (by personal service or otherwise) from enforcing, threatening to enforce, or recommending enforcement of Canon 7(B)(1) of the Ohio Code

of Judicial Conduct against any judicial candidate based on nonobscene, nondefamatory speech, and from investigating, threatening to investigate, or recommending investigation of possible violations thereof based on nonobscene, nondefamatory speech;

(5) orders that this injunction shall not be construed to enjoin any person from enforcing, threatening to enforce, or recommending enforcement of Canon 7(B)(1) of the Ohio Code of Judicial Conduct, based on defamatory speech, obscene speech, or nonexpressive conduct, i.e. conduct that is not speech, or from investigating, threatening to investigate, or recommending investigation of possible violations thereof;

(6) orders that the plaintiff need not post bond to secure this permanent injunction; and

(7) enters final judgment in favor of the plaintiff.

This order is final and appealable.

IT IS SO ORDERED.

/s/ Ann Aldrich
ANN ALDRICH
UNITED STATES DISTRICT JUDGE

Dated: January 26, 2007

The Honorable WILLIAM A. O'NEILL,	)	Case No. 1:04-CV-1612
Plaintiff,	)	Judge Ann Aldrich
v.	)	Magistrate Judge Patricia A. Hemann
JONATHAN E. COUGHLAN,	)	
Defendant.	)	**MEMORANDUM AND ORDER**

Before the court is the motion of defendant Jonathan Coughlan, Disciplinary Counsel for the Supreme Court of Ohio ("Coughlan") to vacate, dissolve, or modify the preliminary injunction entered by the court on September 14, 2004 [Docket No. 29] on the grounds that the court should have abstained from ruling on the constitutional merits of plaintiff William O'Neill's ("O'Neill") claims under *Younger v. Harris*, 401 U.S. 37 (1971). For the following reasons, the court denies Coughlan's motion.

I. Background

O'Neill, an Ohio Court of Appeals Judge, was a candidate for a seat on the Ohio Supreme Court in the November 2004 election. O'Neill's campaign literature, advertising and website identified him as a judge on the Court of Appeals for the Eleventh District and identified

him as a Democrat. Those materials also advanced the theme "Money and Judges Don't Mix" in connection with his call for judicial campaign finance reform and his policy of declining donations over $10. In July 2004, O'Neill received a letter from Coughlan's office, indicating that a grievance had been filed against O'Neill regarding his campaign activities and ordering O'Neill to respond as required by Ohio's rules governing the judiciary and state bar. O'Neill instead filed a complaint in federal court in August 2004, seeking injunctive relief from the enforcement of three canons of the Ohio Code of Judicial Conduct ("the Code"), because those canons violated the federal constitutional free speech rights of state judicial candidates.[1]

In a brief filed on August 16, 2004 [Docket No. 7], and again at the show cause hearing held on that date, Coughlan initially argued that the court lacked jurisdiction because O'Neill's claims were unripe, and because

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[1]Canon 7(B)(1) requires judges and judicial candidates to "maintain the dignity appropriate to judicial office. O'Neill challenges the enforcement of this canon with regard to his campaign materials' arguable insinuation that Ohio Supreme Court seats are "for sale to campaign donors.

Canon 7(B)(3)(b) provides that "[a]fter the day of the primary election, a judicial candidate shall not identify himself or herself in advertising as a member of or affiliated with a political party.

Canon 7(D)(2) states that judicial campaign materials and ads may not "[u]se the term 'judge' when a judge is a candidate for another judicial office and does not indicate the court on which the judge currently serves.

Coughlan was not the proper party in interest. After hearing oral argument at that hearing, the court rejected Coughlan's arguments, and issued a temporary restraining order ("TRO") running through August 26, 2004. On O'Neill's motion, the court extended the TRO through September 14, 2004 [Docket No. 9].

On August 31, 2004 and September 8, 2004, Coughlan filed briefs in opposition to O'Neill's motion for a preliminary injunction and seeking dismissal of the case [Docket Nos. 11, 13]. In his August 31 brief, while declining to address O'Neill's as-applied challenges to the canons, Coughlan chose to specifically "address the facial challenges to each Canon that Plaintiff raises below in order to demonstrate that Plaintiff will not succeed on the merits of his action" (Def.'s Mem. in Opp'n [Docket No. 11], at 8-9). Coughlan then proceeded to argue in that brief that this case is distinguishable from *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), and that each of the three challenged canons is constitutional. (*Id.*, at 9-15). Well over one-third of Coughlan's August 31 brief was devoted to addressing the merits of O'Neill's constitutional claims, and Coughlan made the decision to address O'Neill's claims on their constitutional merits after expressly declining to address the merits of those claims either orally on in writing while opposing the TRO.

After considering Coughlan's additional briefs [Docket Nos. 11, 13] and O'Neill's additional briefs [Docket Nos. 10, 12], the court issued a preliminary injunction ("PI") [Docket No. 14] on September 14, 2004. In issuing the

PI, the court accepted Coughlan's explicit invitation to determine the constitutional merits of O'Neill's claims after Coughlan had refused to address those merits in opposing the TRO, and found that O'Neill's claims had constitutional merit. The court determined that O'Neill was very likely to show that Canons 7(B)(3)(b) and 7(D)(2) violate the First Amendment, both facially and as applied to him. The court further determined that O'Neill was very likely to show that the enforcement of Canon 7(B)(1) was unconstitutional as applied to him.

On October 6, 2004, Coughlan filed a "supplement" to his earlier motion to dismiss [Docket No. 16], for the first time seeking dismissal of the case based on *Younger* abstention grounds. Coughlan raised *Younger* abstention for the first time after declining to address the merits of O'Neill's claims in opposing the TRO, then explicitly addressing the merits of those claims in his brief in opposing the PI.

II. Discussion

The *Younger* abstention doctrine requires the court to abstain:

> from adjudicating a matter properly before it in deference to ongoing state . . .proceedings. Three considerations have emerged for determining when abstention is appropriate: (1) whether the underlying proceedings constitute an ongoing state judicial proceeding; (2) whether

> the proceedings implicate important state interests; and (3) whether there is an adequate opportunity in the state proceedings to raise a constitutional challenge.

Tindall v. Wayne County Friend of Court, 269 F.3d 533, 538 (6th Cir. 2001) (citing *Younger v. Harris*, 401 U.S. 37, 37-38 (1971) (formulating rule in criminal context) and *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982) (extending *Younger* abstention doctrine to civil and administrative proceedings)). While *Younger* abstention exists to preserve "comity" and "a proper respect for state functions," *Middlesex County Ethics Comm.*, 457 U.S. at 431, *Younger* abstention may
be waived if "the State expressly urge[s] . . . the District Court to proceed to an adjudication of the constitutional merits." *Ohio Civil Rights Comm'n v. Dayton Christian Sch.*, 477 U.S. 619, 626 (1986).

In arguing against abstention, O'Neill does not argue that proceedings under Ohio's rules governing the judiciary and the bar fail to implicate important state interests, nor does he argue that he would be deprived of an adequate opportunity to present his constitutional claims in the state proceedings. Indeed, in examining Ohio's disciplinary procedures, the Sixth Circuit has held that the proceedings do implicate important state interests and that those under investigation do possess an adequate opportunity to present their constitutional claims. *Berger v. Cuyahoga County Bar Ass'n*, 983 F.2d 718, 723 (6th Cir. 1993).

O'Neill does, however, present two arguments against *Younger* abstention. First, he argues that the underlying proceedings do not constitute an "ongoing state judicial proceeding." Second, he argues that even if the underlying proceedings satisfy the first prong of *Younger*, by failing to raise *Younger* until after the court's preliminary injunction ruling, Coughlan has waived any claim to abstention.

Regarding O'Neill's first argument, it is clear that under Ohio law, the filing of a grievance constitutes the beginning of a state judicial proceeding. *Hecht v. Levin*, 66 Ohio St.3d 458, 461-62, 613 N.E.2d 585, 588 (1993). In *Hecht*, the Ohio Supreme Court held "that filing a grievance complaint with a local bar association is a 'judicial proceeding' because such a filing initiates the purely judicial disciplinary procedure created by this court" in order to hold that statements made in such a grievance "enjoy[] an absolute privilege against a civil action based thereon as long as the statement is relevant and material to the proceeding." *Id.* at 462, 613 N.E.2d at 588. As the first prong of *Younger* is dependent on state law characterization of proceedings, it is clear that the underlying proceedings in this case constitute "ongoing state judicial proceedings" under *Younger*. *Middlesex County Ethics Comm.*, 457 U.S. at 433. Put simply, because the Ohio Supreme Court has held that a grievance begins judicial proceedings for the purposes of immunizing statements made in such a grievance, the court could not find other than that the grievance also begins judicial proceedings for the purposes of *Younger*. Therefore, unless Coughlan has

somehow waived *Younger* abstention, the doctrine would apply and the court must abstain.

O'Neill, however, argues next that because it is possible for the state to waive its *Younger* abstention claim by "expressly urging" an "adjudication of the constitutional merits," Coughlan's choice to address the constitutional merits in opposing the preliminary injunction after declining to address the merits in opposing the temporary restraining order, combined with Coughlan's failure to raise *Younger* until after the court's preliminary injunction, constitutes waiver. Coughlan should have raised *Younger* abstention from the very beginning, and certainly prior to any ruling on the merits by this court on O'Neill's First Amendment claims. Instead, Coughlan declined to address the merits of O'Neill's claims in opposing the temporary restraining order, and then *chose* to address the constitutional merits of O'Neill's claims in his brief opposing the preliminary injunction while failing to raise *Younger* abstention during that entire time.

By failing to raise *Younger* abstention prior to either of the court's injunctive orders, and by explicitly *choosing* to address the constitutional merits of O'Neill's First Amendment claims in opposing the preliminary injunction after *declining* to do so in opposing the temporary restraining order, "the State expressly urge[d] . . . the District Court to proceed to an adjudication of the constitutional merits." *Dayton Christian Sch.*, 477 U.S. at 626. For the court to abstain at this point would be to ignore the clear mandate of the Supreme Court in *Dayton Christian Schools*. More importantly, if the court

were to abstain at this point, the court would have to ignore not just Coughlan's decision to argue the constitutional merits of O'Neill's claims, but also his *choice* to do so after expressly declining to address those merits in opposing the temporary restraining order. Abstaining at this point would not serve the interests of comity that *Younger* abstention protects, and would instead penalize O'Neill for *Coughlan's* decision to argue the constitutional merits of O'Neill's claims before this court in opposing the preliminary injunction. Therefore, the court holds that *Younger* abstention was waived by the combination of both (1) Coughlan's decision to argue the merits of O'Neill's claims in opposing the preliminary injunction after declining to do so in opposing the temporary restraining order and (2) his failure to raise *Younger*, prior to a ruling by this court on the merits of O'Neill's claims in the form of the preliminary injunction at issue.

III. Conclusion

For the foregoing reasons, the court denies Coughlan's motion to vacate the preliminary injunction [Docket No. 29].

This order is not final, but it is appealable. 28 U.S.C. § 1292(a)(1).

IT IS SO ORDERED.

/s/ Ann Aldrich
ANN ALDRICH
UNITED STATES DISTRICT JUDGE

Dated: June 16, 2006

Note Regarding Irregularities
In The District Court Opinion

The Memorandum and Opinion and Order issued by the United States District Court for the Northern District of Ohio on September 14, 2004, was improperly paginated by the district court. The original document skips from Page 16 to Page 22 with no intervening content, and from Heading B to Heading D, with no matter in between. The pagination error is not reflected in the text that follows because of the use of an appendix pagination, but the error with respect to the heading is produced as in the original test.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

THE HONORABLE WILLIAM M. O'NEILL,	)	Case No.: 1:04CV1612
	)	Judge Ann Aldrich
Plaintiff,	)	
v.	)	
JONATHAN E. COUGHLAN,	)	MEMORANDUM OPINION AND ORDER
Defendant.	)	

On Monday, August 16, 2004, this court heard oral argument on Judge O'Neill's application for a temporary restraining order ("TRO"). At the conclusion of the hearing, the court orally granted that application and issued a TRO running for ten days (starting from Tuesday, August 17 and excluding weekends and holidays), *i.e.*, through and including Monday, August 30, 2004.

On August 26 O'Neill moved to extend the TRO. Pursuant to Federal Rule of Civil Procedure 65(b) and for good cause shown, this court granted the motion. The TRO was extended for an additional ten days, excluding weekends and holidays: starting from Tuesday, August 31, the extended TRO ran through and including Tuesday, September 14, 2004.

On August 31 Judge O'Neill filed a supplemental brief in support of his application for a preliminary injunction, and Coughlan filed an opposition to preliminary/permanent injunction *and* a motion to dismiss. On September 7 Judge O'Neill filed a reply in support of his application for preliminary injunction and an opposition to the motion to dismiss. On September 8 Coughlan filed a supplemental brief and reply in support of his motion to dismiss.

For the reasons that follow, the court grants Judge O'Neill's motion for a preliminary injunction, but defers ruling on his motion for a permanent injunction and Coughlan's motion to dismiss.

I. BACKGROUND

Plaintiff O'Neill, a judge on the Ohio Court of Appeals in Warren (11th District), is running for a seat on the Ohio Supreme Court this November. O'Neill's campaign literature, advertising and website identifies him as a judge on the Court of Appeals for the Eleventh District; identifies him as a Democrat; and advances the theme "Money and Judges Don't Mix" in connection with his call for judicial campaign finance reform and his policy of declining donations over $10. *See* Comp. ¶¶ 1-3 and 6-7. On August 12, 2004 he filed a complaint and an application for a TRO, a PI, and a hearing. The defendant filed a response brief on August 16 contending that this controversy is not ripe and that the disciplinary counsel is not the real party in interest; the defendant did not address the merits at that time.

II. ISSUES

On July 21, 2004 O'Neill received a letter from the Ohio Supreme Court's Disciplinary Counsel announcing that he was initiating an investigation against him due to a grievance filed by Cuyahoga County GOP chairman James Trakas. *See* Comp. ¶¶ 8-10 and Ex. B. The grievance charges that O'Neill is violating three provisions of the Ohio Code of Judicial Conduct ("the Code"):

- **Canon 7(B)(3)(b)**, which provides that "[a]fter the day of the primary election, a judicial candidate shall not identify himself or herself in advertising as a member of or affiliated with a political party." *See* Comp. ¶¶ 11-14.

- **Canon 7(D)(2)**, which states that judicial campaign materials and ads may not "[u]se the term 'judge' when a judge is a candidate for another judicial office and does not indicate the court on which the judge currently serves." *See* Comp. ¶ 17.

- **Canon 7(B)(1)**, which requires judges and judicial candidates to "maintain the dignity appropriate to judicial office." This relates to O'Neill's alleged insinuation that Ohio Supreme Court seats are "for sale" to campaign donors. *See* Comp. 15.

O'Neill seeks declaratory and injunctive relief holding that these canons cannot be enforced because, on their face and as applied, they violate judicial candidates' First Amendment right to freedom of speech and

expression. He contends that these canons both compel and restrict protected speech on matters of public importance without furthering any legitimate governmental interest.

III. THE COMPLAINT IS RIPE FOR DECISION

"Ripeness requires that the injury in fact be certainly impending." *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cty.*, 274 F.3d 377, 399 (6th Cir. 2001) (citations and internal quotation omitted), *cert. denied*, 535 U.S. 1073 (2002). The ripeness doctrine exists to ensure that courts decide only existing, substantial controversies, not hypothetical questions or possibilities. *Deja Vu*, 274 F.3d at 399 (citing *Dixie Fuel Co. v. Comm'r of Soc. Sec.*, 71 F.3d 1052, 1057 (6th Cir. 1999)). In determining whether O'Neill's challenge to these canons is ripe, the court considers "whether the issues are fit for judicial decision as well as the hardship to the challenging party resulting from potential delay in obtaining judicial decision." *Deja Vu*, 274 F.3d at 399 (citation omitted). The court finds that O'Neill's complaint is ripe for decision. As he points out,

> [T]he consequence of Mr. Trakas's letter is that Judge O'Neill is now under investigation by Disciplinary Counsel. While there is no charge pending against him at this juncture, Judge O'Neill must weather the investigation, and bear the threat of prosecution and sanctions for engaging in truthful, non-misleading constitutionally protected expression. And because of that

> threat, Judge O'Neill is fearful of continuing to communicate his message to the voters of the State of Ohio.

Pl.'s Mot. at 9.

O'Neill's fear of discipline is not speculative, as the defendant has no discretion over whether to act upon the grievance and has already asked for O'Neill's response. The disciplinary counsel's July 21, 2004 letter to O'Neill states, "Pursuant to Gov. Bar R. V, as referenced in Gov. Jud. R. II, the Disciplinary Counsel is required to investigate any matter filed with him or that comes to his attention. Accordingly, this office must obtain a response to such grievances, regardless of the form or ultimate sufficiency thereof. * * * Please provide your written response on or before August 4, 2004." *Cf. Kallstrom v. City of Columbus*, 136 F.3d 1055, 1068-69 (6th Cir. 1998).

Moreover, the Ohio Supreme Court has already enforced Canon 7(B)(1), the one requiring judicial candidates to "maintain the dignity appropriate to judicial office," to punish a judicial candidate for running an ad suggesting that her opponent's decisions on the bench had been unduly influenced by contributions from the plaintiffs' bar. The Ohio Supreme Court specifically rejected the judicial candidate's contention that the canon violated her constitutional right to free speech, and sanctioned her because "the ad portrayed a lack of dignity appropriate to judicial office by suggesting to Ohio voters that a justice's

decisions were influenced by receipt of campaign contributions." *In re Complaint against Harper*, 77 Ohio St.3d 211, 214, 219 (Ohio 1997).

Thus the threat of enforcement of these three canons "hangs over [O'Neill] like the sword of Damocles." *J.L. Spoons, Inc. v. Brown*, 40 F. Supp. 2d 902, 905 (N.D. Ohio 1999) (Aldrich, J.) (quoting *Metro. Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252, 265 n.13 (1991)). This case illustrates the wisdom of the rule that a party not yet affected by the enforcement of a putatively unconstitutional restriction on his First Amendment rights is allowed to challenge the restriction "in order to ensure that an overbroad" or otherwise unconstitutional restriction "does not act to chill the exercise of free speech and expression...." *Deja Vu*, 274 F.3d at 399-400 (citing *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177, 1182 (6th Cir. 1995)).

IV. LEGAL STANDARD: Preliminary Injunctive Relief

On a request for preliminary injunctive relief, the court considers whether the movant is likely to succeed on the merits, whether the movant will suffer irreparable injury absent an injunction, whether an injunction will substantially harm others, and whether an injunction would serve the public interest. *See Capobianco v. Summers*, __ F.3d __, 2004 WL 1635564, at *1 (6th Cir. July 23, 2004) (cite omitted). These factors are not absolute prerequisites; the court balances each against the others. *See id.* at *2 (citing *Dayton Area Visually*

Impaired Persons v. *Fisher*, 70 F.3d 1474, 1480 (6th Cir. 1995), *cert. denied*, 517 U.S. 1135 (1996)). Our Circuit has "repeatedly noted that the first factor," likelihood of success, "is frequently dispositive in the First Amendment context." *Capobianco*, 2004 WL 1635564 at *2 (citing *Deja Vu*, 274 F.3d at 400, *et al.*).

V. First Amendment Rights of Candidates for Elected Judicial Office

A. Legal Standard

The First Amendment states that "Congress shall make no law ... abridging the freedom of speech." Along with other provisions of the First Amendment, the Free Speech Clause has been incorporated against the States through the Due Process Clause of the Fourteenth Amendment. *See Strout* v. *Albanese*, 178 F.3d 57, 59 n.4 (1st Cir.), *cert. denied*, 528 U.S. 931 (1999).[1]

The First Amendment's Free Speech Clause "embodies '[o]ur profound national commitment to the free exchange of ideas." *Ashcroft* v. *ACLU*, 535 U.S. 564, 573 (2002) (citing *Harte-Hanks Communications* v. *Connaughton*, 491 U.S. 657, 686 (1989)). As a general matter, "'the First Amendment means that government

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[1] *Cf. ACLU of Ohio* v. *Capitol Square Review & Advisory Bd.*, 210 F.3d 703, 705 (6th Cir. 2000) (First Amendment Establishment Clause incorporated against States) (citing *Murdock* v. *Pa.*, 319 U.S. 105 (1943)), *on reh'g en banc o.g.*, 243 F.3d 289 (6th Cir. 2001).

has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Ashcroft v. ACLU*, 535 U.S. at 573 (citing *Bolger v. Youngs Drug Product Corp.*, 463 U.S. 60, 65 (1983) (internal cite omitted)).

The Supreme Court holds that speech about the qualifications of candidates for public office is "at the core of our First Amendment freedoms," and that any restriction on such speech is subject to strict scrutiny. *See Republican Party of Minnesota v. White*, 536 U.S. 765, 774 (2002). Under the strict scrutiny test the defendant has the burden of proving that the restriction is narrowly tailored to serve a compelling state interest. *See id.* (citation omitted). To show that the challenged canons are "narrowly tailored," the defendant must demonstrate that they do not "unnecessarily circumscrib[e] protected expression." *See id.* (citing *Brown v. Hartlage*, 456 U.S. 45, 54 (1982)). *See, e.g., US v. Playboy Entertainment Group*, 529 U.S. 803 (2000) (statute requiring cable TV operators to "scramble" sexually explicit programs or limit them to certain hours violated First Amendment's free speech clause, absent showing that requirement was least restrictive means of achieving goal of protecting children from seeing or hearing such programs).

B. O'Neill is Likely to Show that Ohio Canon 7(B)(3)(b)Violates the First Amendment Both Facially and As Applied

Canon 7(B)(3) provides that a candidate may:

(a) * * *

(iii) State in person or in advertising that he or she is the nominee of or is endorsed by a political party.

(iv) From the day on which he or she becomes a judicial candidate through the day of the primary election, identify himself or herself in person or in advertising as a member of or affiliated with a political party.

* * *

(c) After the day of the primary, identify himself or herself in person as a member of a political party.

Canon 7(B)(3) also warns, however, that:

(b) After the day of the primary election, a judicial candidate shall not identify himself or herself in advertising as a member of or affiliated with a political party.

The grievance letter alleges, in pertinent part, "Judge O'Neill repeatedly identifies himself as a Democrat in his literature..., and his party designation is blatantly apparent on his website. He specifically states that he is the Democratic candidate. Canon 7(B)(3)(b) prohibits such a statement."

This canon restrains speech on the basis of content, a type of restriction that the government generally has no right to impose. *See Ashcroft v. ACLU*, 535 U.S. at

573. O'Neill contends that this canon does not further any legitimate governmental interest, let alone a compelling one. He further contends that this canon is not narrowly tailored to further any such interest, because the canons still permit judicial candidates to (1) identify their party membership and affiliation in person and (2) both state in person and advertise the fact that they are endorsed by a particular political party. Consequently, O'Neill urges, Canon 7(B)(3)(b) is unconstitutional under the Supreme Court's interpretation of the First Amendment in *White*. *See* Brief in Support of Pl.'s Motion for a Temporary Restraining Order and Preliminary Injunction ("Pl.'s Mot.") at 1-2.

In *Republican Party of MN v. White*, 536 U.S. 765 (2002) the Supreme Court applied strict scrutiny and struck down a Minnesota canon of judicial conduct that prohibited a judicial candidate from announcing his or her views on disputed legal or political issues ("the announce rule"). Minnesota asserted its interests in maintaining an impartial judiciary, which it contended protected the due process rights of litigants coming before the courts, and in maintaining *the appearance* of an impartial judiciary, which it contended preserved public confidence in the judiciary.

If impartiality meant the lack of bias for and against a party, the Supreme Court in *White* held that the announce rule was "barely tailored" to advance either asserted interest because it was not limited to speech for or against particular parties. Rather, the rule operated as a categorical prohibition on judicial

candidates' speech about disputed political and legal issues. *See White*, 536 U.S. at 776. If impartiality meant the lack of bias for and against a particular legal or political viewpoint (rather than a particular party), the Supreme Court in *White* held that impartiality was not a compelling state interest since "a judge's lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice." *Id.* at 777.

Most broadly, if impartiality meant openmindedness in the sense that a judge be willing to consider views contrary to his predispositions, the Court rejected the notion that the rule had been adopted to advance such impartiality. *Id.* at 778. The Court wrote forcefully,

> The short of the matter is this: In Minnesota, a candidate for judicial office may not say "I think it is constitutional for the legislature to prohibit same-sex marriages." He may say the very same thing, however, up until the very day before he declares himself a candidate, and may say it repeatedly (until litigation is pending) after he is elected. As a means of pursuing the objective of open-mindedness that respondents now articulate, the announce clause is so woefully underinclusive as to render belief in that purpose a challenge to the credulous. *See City of Ladue v. Gilleo*, 512 U.S. 43, 52-53 ... (1994) (noting that underinclusiveness "diminish[es] the credibility of the government's rationale for restricting speech"); *Florida Star v. B.J.F.*, 491 U.S. 524, 541-42

> ... (1989) (Scalia, J.) (concurring in judgment) ("[A] law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited" (internal quotation marks and citation omitted)).

Id. at 779-80.

Likewise here, Ohio may argue that the canon prohibiting a judicial candidate from advertising his party membership or affiliation after the primary election advances its interest in preserving the public's confidence in the judiciary's impartiality, fairness or openmindedness. But the canon is "woefully underinclusive" because it allows candidates to (1) advertise their party membership or affiliation before the primary election, and (2) state their party membership or affiliation in person, both before and after the primary election.

Ohio might also argue that this canon advances its compelling interest in maintaining a judicial system free from the partisan allegiances, biases, and machinations that characterize the legislative and executive branches. But the Supreme Court's decision in *White* resoundingly forecloses this line of argument. *White* rejected Minnesota's argument there was a distinction of constitutional magnitude that should be drawn between elected legislators and elected judges that justified prohibiting judicial candidates from

speaking out on disputed legal or political issues:

> The complete separation of the judiciary from the enterprise of "representative government" might have some truth in those countries where judges neither make the law themselves nor set aside the laws enacted by the legislature. It is not a true picture of the American system. Not only do state court judges possess the power to "make common law," but they have the immense power to shape the States' constitutions as well. Which is precisely why the election of state judges became popular.
>
> * * *
>
> *[T]he First Amendment does not permit it [the State] to achieve its goal by leaving the principle of elections in place while preventing candidates from discussing what the elections are about.* "[T]he greater power to dispense with elections altogether does not include the lesser power to conduct elections under conditions of state-imposed voter ignorance. If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process ... the First Amendment rights that attach to their roles.

White, 536 U.S. at 784, 788 (citations omitted) (emphasis added).

Under the First Amendment as interpreted by *White*,

judicial candidates are entitled to state their party affiliation or membership in any medium or venue, at any time, and voters are entitled to have that information and act on it as they see fit. The voters' own beliefs, experience and reasoning may lead them to draw certain inferences from a judicial candidate's party affiliation or membership. The Supreme Court touched on this issue when it struck down California's law prohibiting political parties from endorsing candidates in a primary election:

> Free discussion about candidates for public office is no less critical before a primary than before a general election. In both instances, the election campaign is a means of disseminating ideas as well as attaining political office. California's ban on primary endorsements ... directly hampers th [sic] ability of a party to spread its message *and hamstrings voters seeking to inform themselves about the candidates* and the campaign issues.

Eu v. San Francisco Democratic Central Committee, 489 U.S. 214, 223 (1989).

The drafters of Canon 7(B)(3)(b) may feel that the voters may draw illogical or incorrect inferences based on judicial candidates' party affiliation or membership, or may place too much weight on the inferences they draw. It may be that voters will allow a judicial candidate's party affiliation or membership to dictate their vote, obviating the perceived need for further

analysis or inquiry into the candidate's qualifications, temperament and views.

But the First Amendment does not permit the State to dictate what information the voters may be "trusted" with. The First Amendment guarantees voters the right to obtain whatever information they like, and to decide what information is relevant to their decision on whom to elect to the bench. Conversely, for the voters' First Amendment right to mean anything, judicial candidates must be allowed to impart whatever information they wish about their party membership or affiliation, their views on political and legal issues, and their personal philosophy – without restriction. As Justice Kennedy put it in his concurrence in *White*, "Explicit standards of judicial conduct provide essential guidance for judges in the proper discharge of their duties.... Yet these standards may not be used by the State to abridge the speech of aspiring judges in a judicial campaign.... *What [the State] may not do ... is censor what the people hear as they undertake to decide for themselves which candidate is most likely to be an exemplary judicial officer. Deciding the relevance of candidate speech is the right of the voters, not the State.*" *White*, 536 U.S. at 794 (Kennedy, J., concurring) (emphasis added). *Accord Edenfeld v. Fane*, 507 U.S. 761, 767 (1993) ("the general rule is that the speaker and the audience, not the government, assess the value of the information presented").

If the concerns noted above greatly trouble the legislature, the proper solution is to stop electing judges and make state judgeships appointed offices. Justice O'Connor noted as much in her concurrence in *White*: "If the State has a problem with judicial impartiality, it is largely one the State has brought upon itself by continuing the practice of popularly electing judges." *White*, 536 U.S. at 792 (O'Connor, J., concurring).

D. Very Likely that Canon 7(D)(2) Violates the First Amendment Facially and As Applied

Canon 7(D)(2) states, "During the course of any campaign ... a judicial candidate ... shall not knowingly or with reckless disregard do any of the following: * * * (2) Use the term 'judge' when a judge is a candidate for another judicial office and does not indicate the court on which the judge currently serves." O'Neill seems to admit that not every mention of his status as a judge specifies the court on which he sits:

> Judge O'Neill's literature does, in fact, identify that he is a member of the Eleventh District Court of Appeals. Yet according to the grievant, even though his campaign literature is truthful, under Canon 7(B)(2) [sic, Canon 7(D)(2)], Judge O'Neill is required to parse each and every line of his materials, and every mention of his candidacy for Supreme Court must also state [that] he currently sits on the Eleventh Appellate Judicial District.

Pl.'s Mot. at 8.

Canon 7(D)(2) restrains speech on the basis of content, a type of restriction that the government generally has no right to impose. *See Ashcroft v. ACLU*, 535 U.S. at 573. O'Neill contends this canon compels a candidate to include certain material in his campaign literature, even if his campaign literature is already entirely truthful and not misleading. *See* Pl.'s Mot. at 2 and 8.

This court is unlikely to find that a compelling governmental interest is served, and served only through the narrowest possible restriction on First Amendment rights, by Canon 7(D)(2). Perhaps the drafters of this canon feared that if a judge running for another judicial office were allowed to advertise himself as "Judge Smith for Supreme Court," the voters might wrongly infer that the Judge was already sitting on the higher bench. There is nothing false about a sitting Judge advertising himself as just that, "Judge Smith." But the question is, does the State have a compelling interest in prohibiting *truthful* speech that it believes has *the potential* to mislead voters who have no other knowledge of the judicial candidate's current position and do not inquire further into the matter? Absent binding precedent to the contrary, the State has no such interest. So long as the judicial candidate does not lie about which court he sits on, any voter can easily find out which court he sits on without the State censoring the judicial candidate.

E. Very Likely that Canon 7(B)(1) Violates the 1st Amendment *as Applied to O'Neill* - No Need to Decide Whether This Canon Is *Facially* Unconstitutional

Canon 7(B)(1), which requires judges and judicial candidates to "maintain the dignity appropriate to judicial office." The grievance against O'Neill charges that he is violating this canon by implying that Ohio Supreme Courts are for sale to campaign donors. The grievance letter charges, in pertinent part, "Judge O'Neill recklessly attacks the integrity of the Ohio judiciary. * * * His statements, 'This Court is Not for Sale!' and 'Money and Judges don't mix', viciously malign the fair, unbiased and impartial judiciary of this great state." Comp., Ex. O'Neill has filed a reproduction of his worldwide web homepage dated July 15, 2004 which states:

> Judge William O'Neill of the 11th District Court of Appeals believes that the idea of lawyers bankrolling judicial campaigns is a bad idea. "Money and judges don't mix," he said. "Never have. Never will." * * *
>
> * * *
>
> O'Neill is proud of his strong independent streak and has been an outspoken advocate of reducing the influence of campaign contributions in judicial races. His trademark slogan "Money and Judges Don't Mix," and his self-imposed contribution limit of $10 per person are in place in this his third campaign. While

> being outspent in his previous race 10-to-1 by his opponent, his clear commitment to independence earned him a second straight judicial victory.
>
> Judge O'Neill seeks your support in his bid for the Ohio Supreme Court. The time has come to end the public's suspicion that political contributions influence court decisions. The election of Judge O'Neill is the best step toward sending the message: "This Court Is Not For Sale!"

Comp., Ex. B (http:www.oneillforjustice.com).

Thus, as the grievance seeks to apply this canon to O'Neill, the canon restrains speech on the basis of content, a type of restriction that the government generally has no right to impose. *See Ashcroft v. ACLU*, 535 U.S. at 573. O'Neill contends that this canon is unconstitutionally vague, because it fails to put candidates on notice about what kind of message might run afoul of its prohibition, allowing the state's disciplinary counsel to arbitrarily decide who has violated it. O'Neill further contends that Canon 7(B)(1) is unconstitutionally overbroad, "for its breadth sweeps within its scope constitutionally protected expression on subjects of interest to the electorate, including comments and discussions of core political subjects." Pl.'s Mot. at 2.

Even assuming *arguendo* that the State has a compelling interest in ensuring that judicial candidates

conduct themselves in a dignified way, applying a sweeping and completely undefined requirement to *speech* chills judicial candidate speech out of fear that they will be disciplined by the State. Such a canon is the antithesis of a narrowly tailored measure that restricts the freedom of speech no more than absolutely necessary to achieve the compelling governmental interest.

F. The Balance of the Harms and the Public Interest Strongly Favor a TRO

If the disciplinary counsel is not enjoined from disciplining O'Neill or interfering with his campaign through the enforcement of these three canons, O'Neill will suffer deprivation of his right to speak and communicate freely without fear of State punishment. The Supreme Court holds that "when reviewing a motion for a preliminary injunction, if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated." *ACLU of Ky. v. McCreary Cty., Ky.*, 354 F.3d 438, 445 (6th Cir. 2003) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)), *reh'g en banc denied*, 361 F.3d 928 (6th Cir. 2004). *See, e.g., J.L. Spoons, Inc. v. City of Brunswick*, 49 F. Supp. 2d 1032, 1047 (N.D. Ohio 1999) (Aldrich, J.).[2]

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[2]*See also Chabad of So. Ohio & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427, 436 (6th Cir. 2004) ("Even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief.") (quoting *Newsom v. Norris*, 888 F.2d 371,

Conversely, the disciplinary counsel will suffer no harm if this court enjoins him from enforcing unconstitutional restrictions on freedom of speech. "No substantial harm can be shown in the enjoinment of an unconstitutional policy." *Chabad*, 363 F.3d at 436 (citations omitted).

Lastly, there is nothing more clearly in the public interest than the enforcement of every individual's natural, constitutional rights, including the right to speak freely as recognized by the First Amendment. *See Morscott, Inc. v. City of Cleveland*, 781 F. Supp. 500, 506 (N.D. Ohio 1990) ("It is beyond cavil that it is in the public interest to uphold a constitutionally protected right."); *Playboy Enters. v. Meese*, 639 F. Supp. 581, 587 (D.D.C. 1986) ("it is the in the public interest to uphold a constitutionally protected right"). This is particularly so in the case of prior restraints, which represent "the most serious and least tolerable infringement of First Amendment rights." *Spoons*, 49 F. Supp, 2d at 1047 (quoting *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976)).

G. Scope of the Injunction

Like the TRO, the preliminary injunction applies to all three of the challenged canons. Because Canon 7(B)(3)(b) or Canon 7(D)(2) probably *facially* violate

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378 (6th Cir. 1989)); *Ross v. Meese*, 818 F.2d 1132, 1135 (4th Cir. 1987) ("The denial of a constitutional right, if denial is established, constitutes irreparable harm....").

the First Amendment, the preliminary injunction bars the defendant from enforcing, threatening to enforce, or investigating any alleged violations of those two canons.

However, the preliminary injunction is narrower as to Canon 7(B)(1), the one which requires judicial candidates to "maintain the dignity appropriate to judicial office." As our Circuit has cautioned, "Injunctive relief involving matters subject to state regulation may be no broader than necessary to remedy the constitutional violation." *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1069 (6th Cir. 1998) (citing *Knop v. Johnson*, 977 F.2d 996, 1008 (6th Cir. 1992), *cert. denied*, 507 U.S. 73 (1993)). Mindful of this principle, the preliminary injunction does not completely bar the defendant from enforcing Canon 7(B)(1) against O'Neill or others. Rather, it bars the defendant only from sanctioning, threatening to sanction, investigating or threatening to investigate O'Neill for nondefamatory, nonobscene speech, e.g. O'Neill's statements and implications that "money and judges don't mix," that it is necessary to reform state judicial campaign finance laws, that the current system makes the public suspicious that the courts are for sale, etc. Today's opinion does not intimate that the Constitution prohibits the enforcement of judicial conduct rules regarding obscene or defamatory speech.

The preliminary injunction does not apply to enforcement or threatened enforcement of Canon 7(B)(1) for *non-speech conduct* by O'Neill or others.

The First Amendment may or may not permit the state to discipline judicial candidates for *conduct* that the state finds inconsistent with "the dignity appropriate to judicial office" – and this court need not address that issue in this case.

VI. O'NEILL NEED NOT POST SECURITY

Rule 65(c) provides that no TRO or preliminary injunction ("PI") may issue "except upon the giving of security by the applicant, in such sum as the court deems necessary, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully restrained." Although the language of Rule 65(c) appears mandatory, "the rule in our circuit has long been that the district court possesses over whether to require the posting of security." *Moltan Co. v. Eagle-Picher Indus.*, 55 F.3d 1171, 1176 (6th Cir. 1995) (cites omitted). Our circuit has upheld the decision to grant preliminary injunctive relief without requiring security where the strength of the plaintiff's case and the public interest warranted it. *See Moltan Co.*, 55 F.3d at 1176.[3]

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[3]For decisions requiring nominal or no security for a TRO or PI, see:

Bosley v. Wildwett.com, 310 F. Supp. 2d 914, 935-36 (N.D. Ohio 2004) (Gwin, J.) (requiring only $100 bond for TRO preventing defendant from using videotape of TV news anchor in wet tshirt, without her permission, to promote its sexually oriented products);

Accordingly, O'Neill need not post security. It is unlikely that disciplinary counsel will be found to have been wrongfully restrained, and there is no cognizable cost to being prohibited from disciplining someone for exercising his constitutional rights. As the Southern District put it in a First Amendment case, "The purpose of a bond is to ensure that the enjoined party can recover the monetary damages it suffers, if it is wrongfully enjoined. The Defendants will not suffer such damages, if it is ultimately determined that they were wrongfully restrained from enforcement of the legislation at issue." *Bookfriends, Inc. v. Taft*, 223 F. Supp. 2d 932, 953 (S.D. Ohio 2002).

Boyd Cty. H.S. Gay Straight Alliance v. Bd. of Ed. of Boyd Cty., 258 F. Supp. 2d 667, 693 (E.D. Ky. 2003) (no security, as plaintiffs were very likely to succeed on First Amendment and Equal Access Act claims, with little or no risk of monetary harm to defendant);

Guillermety v. Sec'y of Ed., 241 F. Supp. 2d 727, 759 (E.D. Mich. 2002) (no security, given plaintiff student loan debtors' strong likelihood of success and their inability to afford bond);

Detroit Med. Ctr. v. GEAC Computer Sys., 103 F. Supp. 2d 1019, 1024 (E.D. Mich. 2000) (no security, as defendant did not claim it would suffer immediate financial harm due to PI).

VII. ORDER

1. The court grants Judge O'Neill's application for a preliminary injunction.

2. This preliminary injunction shall begin Wednesday, September 14, 2004 and shall remain in force until further order of this court.

3. The defendant and his officers, agents, servants, employees, and attorneys, and anyone in concert or participation with them who receives actual notice of this order (by personal service or otherwise) are enjoined from enforcing, threatening to enforce, or recommending enforcement of Canons 7(B)(3)(b) and 7(D)(2) of the Ohio Code of Judicial Conduct, and from investigating, threatening to investigate, or recommending investigation of possible violations thereof.

4a. The defendant and any of his officers, agents, servants, employees, and attorneys, and anyone in concert or participation with them who receive actual notice of this order (by personal service or otherwise) are enjoined from enforcing, threatening to enforce, or recommending enforcement of Canon 7(B)(1) of the Ohio Code of Judicial Conduct based on nonobscene, nondefamatory speech, and from investigating, threatening to investigate, or recommending investigation of possible violations thereof based

on nonobscene, nondefamatory speech.

4b. This order shall not be construed to enjoin any person from enforcing, threatening to enforce, or recommending enforcement of Canon 7(B)(1) of the Ohio Code of Judicial Conduct based on *non-expressive conduct*, i.e. conduct that is not speech. Nor shall this order be construed to enjoin any person from investigating, threatening to investigate, or recommending investigation of possible violations thereof based on *non-expressive conduct*, i.e. conduct that is not speech.

5. Judge O'Neill need not post bond to secure this preliminary injunction.

The court defers ruling on Judge O'Neill's motion for permanent injunctive relief and Coughlan's motion to dismiss. The court will contact the parties if it deems oral argument and a factual hearing necessary for the determination of those motions.

Under 28 U.S.C. § 1292(a)(1), this is an immediately appealable order. *See Barnett v. Cross*, 894 F.2d 1336, 1990 WL 7939, at *1 (6th Cir. Feb. 2, 1990) (order granting preliminary injunction is a "judgment" for purposes of Fed. R. App. P. 4 because it is an appealable order) (citations omitted); *Nat'l City Bank v. Battisti*, 581 F.2d 565, 568 (6th Cir. 1977).

IT IS SO ORDERED.

s/Ann Aldrich
ANN ALDRICH
UNITED STATES DISTRICT JUDGE

Dated: September 14, 2004

No. 07-3206

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM M. O'NEILL,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	ORDER
	)	
JONATHAN E. COUGHLAN,	)	
	)	
Defendant-Appellant.	)	

BEFORE: GUY, MOORE, and GILMAN, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original

submission and decision of the case. Accordingly, the petition is denied. Judge Moore would grant rehearing for the reasons stated in her dissent.

ENTERED BY ORDER OF THE COURT

Leonard Green
Clerk

U. S. Const., Amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

CODE OF JUDICIAL CONDUCT

Canon 7(B) Political and campaign conduct in general

(1) A judge or judicial candidate shall maintain the dignity appropriate to judicial office.

* * *

(3)(a) A judge or judicial candidate may do any of the following:

(i) Attend political gatherings;

(ii) Speak to political gatherings;

(iii) State in person or in advertising that he or she is the nominee of or is endorsed by a political party;

(iv) From the day on which he or she becomes a judicial candidate through the day of the primary election, identify himself or herself in person or in advertising as a member of or affiliated with a political party.

(b) After the day of the primary election, a judicial candidate shall not identify himself

or herself in advertising as a member of or affiliated with a political party.

* * *

Canon 7(D) Campaign standards

During the course of any campaign for nomination or election to judicial office, a judicial candidate, by means of campaign materials, including sample ballots, an advertisement on radio or television or in a newspaper or periodical, a public speech, press release, or otherwise, shall not knowingly or with reckless disregard do any of the following:

* * *

(2) Use the term "judge" when a judge is a candidate for another judicial office and does not indicate the court on which the judge currently serves. . . .